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REPORTS OF CASES

HEARD AND DETERMINED

BY

THE JUDICIAL COMMITTEE,

AND

THE LORDS

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ON

APPEAL FROM THE SUPREME AND SUDDER DEWANNY COURTS

IN

THE EAST INDIES.

BY EDMUND F. MOORE, ESQ.,

BARRISTER AT LAW.

VOL. IV.

1846-50.

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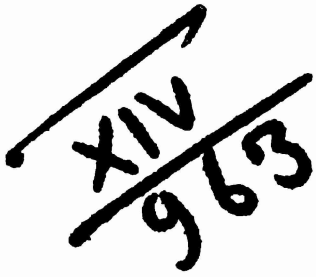

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1846—1850.

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ON APPEAL FROM THE SUPREME AND SUDDER DEWANNY COURTS, IN THE EAST INDIES.

RUNGAMA (Widow), for herself and on behalf of LUTCHMEPUTTY NAIDOO - } *Appellant,*

v.

ATCHAMA (Widow), RAMANADHA BABOO, and PUTTOORY CALY DOSS - } *Respondents.*

AND

ATCHAMA (Widow) - - - *Appellant,*

v.

RAMANADHA BABOO - - - *Respondent.**

On Appeal from the Sudder Dewanny Court at Madras.

16th, 17th, 18th, 19th, & 30th June, & 1st, 2nd & 3rd July 1846.

Review of the Hindoo Law, relating to the validity of a second adoption, by a Hindoo, during the lifetime of the first adopted son.

THERE were two Appeals in this case, against a Decree of the *Sudder Dewanny Adawlut* at *Madras*, V., a *Zemindar*, in the Northern Circars at *Madras*, of the *Soodra* caste,

* Present: Members of the *Judicial Committee*,—The Lord President (the Duke of Buccleuch), Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir E. H. East, Bart., and Sir E. Ryan, Knt.

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made in three separate suits, instituted in the Provincial Court of the Northern Division of *Madras*, to determine the right of succession to the estates of the late *Raja Vassareddy Vencatadry Naidoo*, the hereditary proprietor of large *Zemindary* property, situate in the *zillahs* of *Guntoor*, *Masulipatam*, and *Rajamundry*, in the Northern Division of the Presidency of *Madras*. The first suit was instituted by the Respondent, *Ramanadha*, against *Jaganadha*, the adopted son of the late *Vencatadry*, claiming a part

being childless, adopted, with the consent of his wife, a son, J. At the time of this adoption, he executed a deed with the natural father of J., by which he undertook to make him heir to his *Zemindary* and wealth. V. subsequently married a second wife, and during the lifetime of his adopted son, J., adopted a second son, R. Both these adopted sons lived in V.'s house, who, while they were minors, made a division of his ancestral and other estate, between them, in certain proportions. J., when he came of age, entered into possession of his share: but R., being a minor, V. managed his share for him, and died during his minority. At V.'s death, J. claimed the right of succession to the whole of V.'s estate and property, insisting, that V. was precluded from alienating any portion of the estate, to his, the first adopted son's, prejudice; and that the adoption of R. during his lifetime, was illegal and void. The *Sudder Dewanny Adawlut* at *Madras* decided that the second adoption was valid. Held, upon appeal, by the Judicial Committee of the Privy Council, reversing that decree:—

First. That, according to the Hindoo Law, a second adoption of a son, the first adopted son being alive, and retaining the character of a son, was an illegal and void act.

Secondly. That J.'s acquiescence in the division, after he came of age, did not preclude his right to recover the ancestral estates, as V. had no power to alienate any portion of the ancestral estate to J.'s prejudice. But

Thirdly. That (upon the principle that a party cannot affirm and disaffirm the same transaction) effect must be given to the intentions of V., so far as V. had power of disposing of his property, by an act, *inter vivos*; and in which J. had acquiesced; and that as J. took the whole of the ancestral property of V., he must give up for the benefit of R. that part of V.'s other property, included in his share in the division, and to give effect to which his consent was not necessary.

Among the *Soodras*, a childless Hindoo may adopt a son from a *gotrum* different from his own.

The consent of a wife to the adoption of a son, by her husband, a childless Hindoo, is not essential to the validity of the adoption. Adoption is the act of the husband alone; although the wife may join in it.

Upon a disputed question of adoption, the Provincial Court, and the *Sudder* Court, on appeal, held that the evidence was not sufficient to establish the fact of adoption. Such decision reversed by the Judicial Committee.

of the *Vassareddy* estates, first, as the second adopted son of *Vencatadry*; and, secondly, by virtue of a settlement made by *Vencatadry*, in his lifetime, dividing his estates between *Jaganadha* and *Ramanadha*, the entirety of which had notwithstanding been taken possession of by *Jaganadha*, at *Vencatadry's* death. The second suit was instituted by *Atchama*, the Appellant in the second Appeal, against *Ramanadha*, claiming succession to *Vencatadry's* estates, as the senior widow of *Jaganadha* (who died pending the litigation between him and *Ramanadha*, without issue by either of his wives, *Atchama* or *Rungama*); and secondly, under a Will alleged to have been made in her favour by *Jaganadha*. The third suit was brought by the Appellant, *Rungama*, the junior widow of *Jaganadha*, for herself, and on behalf of *Lutchmeputty*, as his guardian and adoptive mother, against *Atchama*, *Ramanadha*, and one *Puttoory Caly Doss*, claiming for *Lutchmeputty*, as the adopted son, and testamentary heir of *Jaganadha*, the whole of the estates of *Vencatadry* and *Jaganadha*.

The facts which gave rise to these suits were as follow:—

On the 2nd of *April* 1798, *Raja Vassareddy Vencatadry Naidoo*, having no issue of his body, with the concurrence of his wife, adopted *Jaganadha* as his son. The fact of this adoption was notified to the Collector of *Guntoor*, on the same day.

At the time of the adoption, *Vencatadry* entered into an agreement, or contract of adoption, with *Chundramooly Naidoo*, the natural father of *Jaganadha*. This agreement was contained in two instruments. The first, dated the 7th of *April* 1798, executed by *Vencatadry*, and addressed to *Chundramooly*, after re-

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citing that the ceremony of adoption had been performed, declared the effect of it, in the following words :—" Therefore, be it believed, that I have executed this, (my tutelar deity bearing witness,) that *Jaganadha Naidoo* is *hukdar* or heir to my *Zemindary*, *mirasy*, to my wealth and debts; and that I have it not in my power, on any account whatever, to make over (the same) to any other person besides him (*Jaganadha Naidoo*)." The other instrument, dated the 16th of *April* 1798, executed by *Chundramooly*, and addressed to *Vencatadry*, after stating the assent of the natural parents of *Jaganadha*, proceeded thus :—" Whereupon, you having received him in adoption, by performing the whole ceremonies of *Datta-Homam*, *Nama-carana*, &c., conferring upon him your estate and debts, as well as the right of your *Zemindary*, executing a paper to my name, promising that no other, except himself, shall have possession of the above, and sending the said paper to me, and desiring to obtain a document from me also, I have written and tendered this agreement, which is to assure you that the said boy is yours, and that he has nothing to do with me any more."

On the 11th of *May* 1803, *Vencatadry* caused the ceremonies of marriage to be performed, between *Jaganadha*, and *Atchama*, and *Rungama*, all of them being then children; *Atchama* being two or three years older than *Rungama*. These ceremonies were performed simultaneously.

After the lapse of some years, and in the month of *May* 1807, *Vencatadry* married a second wife. Shortly after this second marriage, *Vencatadry*, being desirous of adopting the Respondent, *Ramanadha*, consulted the learned men attached to his *samastanum*, who informed

him, that such adoption was illegal, and could not be made, expressing their opinion in the following form: —"You have already adopted *Jaganadha*, as your son, by performing the necessary ceremonies, and made him heir, both to the real and personal estate acquired by your forefathers, and to your own acquisition. *Jaganadha* has thereby been invested with authority, either to object to your making over the immovable property, acquired by your ancestors, or to acquiesce in the alienation of your own property. You are already the father of a son, and you should not, therefore, make a second adoption."

Notwithstanding this opinion, *Vencatadry* proceeded to adopt *Ramanadha*, as his son, and took him to live with him under the same roof, where he continued till *Vencatadry's* death.

Raja Vassareddy Vencatadry made three successive apportionments, or partitions, of his property, to take effect during his life. One of these apportionments was made in the year 1812, whereby he divided his property into four shares, retaining one share in his own possession, and devoting the income of another to charitable purposes; the two remaining shares being divided between *Jaganadha* and *Ramanadha*: *Jaganadha* being put into possession of the share, called *Chattoor-mooka-Patnam Vahi*, and *Ramanadha* being put into possession of the share, called *Vomma-maheswara Vahi*. To render this disposition of the property final and secure, so far as it was possible for him to do so, he caused instruments to be executed by *Jaganadha* and *Ramanadha* in 1812 and 1814, when they were both minors, in which they mutually acknowledged the arrangement, and promised to acquiesce in it. This partition of the property con-

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tinued throughout the remainder of the minority of *Jaganadha*, and was in existence when he came of age in the early part of 1815. In *February* 1816, another apportionment was made, whereby *Vencatadry* retained in his own hands the portion called the *Dhurma Vahi*, (consisting of 98 villages and a tank,) to be appropriated to charitable purposes, and divided the remaining property, formerly constituting three shares, into two divisions, still called *Chattoor-mooka-Patnam Vahi*, and the *Vomma-maheswara Vahi*. These two divisions were assigned by lot, which had the effect of changing the shares, as formerly allotted, and *Jaganadha* was put in possession of the *Vomma-maheswara*, consisting of 252 villages, and *Ramanadha* into that of the *Chattoor-mooka-Patnam*, consisting of 201 villages. A third apportionment, extending to the residue not previously divided, was made in *July* 1816, when *Vencatadry* divided the *Dhurma Vahi* into two shares, annexing one share, consisting of 62 villages, to *Vomma-maheswara*, the portion which had been last allotted to *Jaganadha*; and the other, consisting of 36 villages and a tank, to *Chattoor-mooka-Patnam*, the division allotted to *Ramanadha*. From that time, it did not appear that *Vencatadry* in any way interfered with the *Vomma-maheswara* division, which he had assigned to *Jaganadha*. Over *Chattoor-mooka-Patnam*, which was in the possession of *Ramanadha*, who was still a minor, *Vencatadry* exercised the absolute power of control and management, up to the time of his death.

In consequence of these several allotments, it appeared that the property which was in the possession or management of *Jaganadha* and *Ramanadha* was as follows:—In the possession of *Jaganadha*; 121 villages in *Guntoor*, 174 villages in *Masulipatam*, 19 vil-

lages in *Rajamundry*. In the possession of *Ramanadha*; 212 villages in *Guntoor*, 6 *lunkas*, or islands, in *Masulipatam*, 19 villages in *Rajamundry*.

In the year 1815, in the lifetime of *Vencatadry*, the revenue payable to Government, in respect of the *Zemindary* property, fell considerably into arrear; and sequestrations, extending over a large portion of the property, were issued in their several *Zillahs*, by the Collectors of *Guntoor* and *Rajamundry*. In consequence of these sequestrations, 81 villages in *Guntoor*, and 19 villages in *Rajamundry*, were taken out of the possession of *Jaganadha*; and 127 villages in *Guntoor*, and 19 villages in *Rajamundry*, out of the possession of *Ramanadha*.

In this state the property remained at the death of *Vencatadry*, which took place on the 17th of *August* 1816. Upon this event, *Jaganadha* submitted a question to the *Pundits*, attached to his *samastanum*, with regard to the wish of *Ramanadha*, to join in the funeral ceremonies. In answer to this question, the *Pundits* all concurred in stating their opinion, that as a second adoption would have been unlawful, *Ramanadha* had no right to assist in the performance of the funeral ceremonies of *Vencatadry*.

Jaganadha thereupon asserted his exclusive title to the *Zemindary* property of the late *Vencatadry*, and addressed *arzis* to the Collectors of *Guntoor* and *Rajamundry*, offering to pay the whole amount of the arrears, in respect of which the villages had been attached.

On the 6th of *October* 1816, *Jaganadha* received an intimation from the Acting Collector of *Guntoor*, that *Vencatadry* was considered to have "divided his district into equal shares, between his two sons, *Jaganadha* and *Ramanadha*, and that, at the time of his death,

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Ramanadha was in the possession of the *Chattoormooka-Patnam Vahi.*" *Jaganadha*, on the receipt of this intimation, tendered the amount of the arrears. He also represented to the Acting Collector, that inasmuch as it was impossible for him to institute any legal proceedings against *Ramanadha* (who was a minor), to determine any adverse claim on his part, unless, by the interposition of the Court of Wards, he was placed in a situation to defend the suit; he, *Jaganadha*, should of necessity be compelled to proceed formally against the Collector, in the event of his refusal to deliver up the whole estate, after the tender of the full amount of the arrears due thereon. To this the Collector replied, that it would be proper that a suit should be forthwith instituted, by *Jaganadha*, against the Collector alone.

Whereupon *Jaganadha*, on the 8th of *November* 1816, filed his plaint in the Provincial Court of the Northern Division, against the then Acting Collector of *Guntoor*, to compel the restitution of the villages in that *Zillah*, which had been sequestered by the Government. The Collector, by his answer, admitted that *Jaganadha* had tendered the amount of the arrears, but alleged, as his reason for not delivering up possession of the villages, held by him under attachment, that *Ramanadha* was the proper person to inherit the same.

On the 10th of *May* 1817, the cause was heard by the Provincial Court, when the Judges (Mr. *Nathaniel Webb*, First Judge, and Mr. *P. Cherry*, Second Judge,) were of opinion, that the real question in the case was the right of succession to the *vahee* or district in question, part of the *Zemindary* of the late *Vencatadry*; and there being an informality in the petition of plaint, it having omitted to set out the names of the villages

comprised in such district, pursuant to section iii., Regulation III., A.D. 1802, the Court nonsuited the Plaintiff. *Jaganadha* presented a petition, praying for a review of the above Judgment. The Provincial Court, in the first instance, refused it; but upon a second petition, to the same purport, they submitted the petition to the *Sudder Adawlut*. The *Sudder* Court, having taken the same into consideration, on the 13th *September* 1817 authorised the Provincial Court to review their Judgment. The Provincial Court thereupon proceeded to review their Judgment, and on the 15th of *November* 1817 passed a decree, whereby they declared the previous decision of the 10th of *May* 1817 null and void; and after observing, that no transfer or registry, in the mode provided by the Regulations, had been made during the lifetime of *Vencatadry*, and considering that the claim then before them could not affect, or have any reference whatever to, the ultimate decision of the legal right of succession, they confined the question solely to whether the Acting Collector of *Guntoor* was justified in refusing to deliver up the villages to *Jaganadha*, on his paying all arrears, and expressed their opinion, that the interests of all parties would have been best consulted by receiving the arrears from *Jaganadha*, and by withdrawing the attachment and delivering the villages to him, and that there was no legal right to withhold them.

To this decree Mr. *Travers*, the Third Judge of the Court, dissented, and on the 27th of *February* 1818 the Collector appealed to the *Sudder Adawlut*, contending, that *Jaganadha* had not produced before him such evidence of his right, as could have justified him, the Collector, in giving, on his own authority, possession to *Jaganadha*, on payment of the balance due.

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Shortly before the presentation of the Collector's petition of appeal, some sums of money were paid into the Provincial Court, in satisfaction of certain instalments, under a Decree, obtained by the late *Vencatadry*, to the whole of which *Jaganadha* laid claim, as the sole heir to the late *Vencatadry*, and *Ramanadha* claimed one-half, as co-heir. Upon this, the Provincial Court referred to the *Sudder Adawlut*, for instructions; the *Sudder* Court stated, that, in their opinion, it involved the question of who was the heir of the deceased *Vencatadry*, and whether there was more than one; that they could not solve these questions, which must be determined by the Provincial Court, on evidence produced before them. And the *Sudder Adawlut* recorded their opinion, for the guidance of the Provincial Court, that the most regular course to be pursued in the case under consideration, and in similar cases where, an original party in a suit being dead, a Court should have any sum to pay over to his representatives, would be to give sufficient public notice that such sum is so payable, and would be paid over, after a stated period, to the person or persons who should bring due proof of their right to receive the same.

In pursuance of this opinion, the Provincial Court, on the 18th of *June* 1818, propounded the following questions, to the *Pundits* of the Northern, Centre, and Southern, Provincial Courts:—

1.—"Is a person, having, conjointly with his wife, adopted a son, and thereafter being displeased with her, and marrying a second wife, authorised by Hindoo law, conjointly with her (the second wife), to adopt a son?"

2.—"A person adopting a son, having, for any rea-

son, adopted a second son, is the former, or the latter, heir to the estate of the person adopting, or are both sons entitled to share the same?"

3.—"If both have a right to share, are they entitled to receive equal shares, or different proportions, of the estate, and what are those proportions to the parties respectively?"

4.—"Has a person who has acquired a large property, power to divide the whole, or any part of the same, equally to both of his adopted sons during his lifetime, and are divisions so made by the father, of legal force after his death?"

5.—"If either the first or second of the adopted sons act contrary to the will of the father knowingly and intentionally, will he, notwithstanding, have a right to the whole, or to a part, of the estate of his father?"

To these questions, the following answers were delivered, by *V. Narain Sastri*, the Hindoo Law-officer of the Provincial Court of Appeal, for the Northern Division. First:—"The man who has married a wife, and who, for want of a legitimate son, adopted a son, and who some time afterwards married a second wife, has authority to adopt a second son, in the event of his entertaining a wish to augment his offspring. The man who wishes to augment his offspring is by law authorised to adopt a son, though he has a legitimate son. On the same principle, a man may adopt a second son given, though he has already a son given, if he is desirous to get numerous offspring.

"In *Lohita Smriti*, and other works, prohibitions are contained, that if a man has a son given, he should not adopt a second son given; and, further, it is ordained that no adoption of a son given can be made while he

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has a son of the body in existence; but it is stated in the works to the following purport:—that since the son delivers his father from hell, he is, therefore, called *Putra*; that the man who imagines, that it is enough for him, if his deliverance from hell can be effected by the means of a single son, has no business to get a second son; that the man who wishes to have a numerous offspring, in order that they may perform the ceremonies called *Gyavrajayati*, besides delivering him from hell, may procure many sons; and that he who wishes not to have his offspring thus increased, is prohibited from procuring another son.

"In the book, *Vivada Bhangarnava*, in the 4th section.—*Sancha* and *Lohita*: 'The perpetual support of a consecrated fire, and the like, the Scriptures and sacrifices, rewarded with ample gratuities, do not procure the sixteenth part of the benefit arising from the birth of an eldest son.'

"Heaven is attained by him who is celebrated as the father of a son, and of a grandson; and whose many children and himself, while living, had completed the study of Scripture and the performance of sacrifice.

"With whom Scripture and sacrifice is not incomplete, whose study of the *Veda*, and performance of sacrifice, fail not. It consequently appears to be a benefit arising from numerous issue, that many sons, and the father himself, fail not in the study of Scriptures and performance of sacrifice. Many sons are to be desired, that some one of them may travel to *Gaya*. Hence sons of various descriptions may be adopted by one who desires numerous offspring.

"The prohibition, that while a son is in existence, there is no need of a second son, is stated in the 4th section of *Vivada Bhangarnava*, as follows:—'But

here the intention of the precept is to forbid adoption, then, only when there is no motive for it; for the benefit desired, namely, deliverance from hell, is obtained without adopting a son given, and through him, therefore, that purpose is not effected; but one who desires numerous issue for other purposes, besides deliverance from hell, may adopt a son given, and others, although he have one legally begotten. *Sridhara Swami* and others have said as much. The *Retnacara* and *Paryate* express, that a son given, and others, should not be adopted, if there be a brother's son; from which it must be understood, that the prohibition concerns one who merely desires male issue for the sake of deliverance from hell. This justifies the fact recorded in the *Bharata* and other works, that *Pandu* having other male issue, accepted of *Bhema*, *Arjuna*, and other sons of his wife, and he did so although he had nephews.' By this work it is prescribed that many sons may be procured. It should not be objected that, by the above work, the procuring of the sons of different descriptions, viz., sons of body and sons given, &c., is alone admitted, and not the procuring of many sons of one and the same class, such as sons given, &c. The adoption already made of many sons of the one and the same class, such as *Bhema*, *Arjuna*, &c., should be considered as sufficient authority."

Second.—"If a man, after adopting a son given, adopt a second son given, under any plea whatever, both the sons given will be brothers agreeably to their seniority and juniority, in the same manner as the natural sons are; consequently the said two sons given, are entitled to inherit the estate of the adoptive father in equal shares, according to the rule called '*Samouscad Asroo-*

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tatvaloo,' which directs equality where no other proportion is specified."

Third.—"As the two sons given in adoption are equally entitled to the estate of their father, so, if a father divide the estate, they should abide by the divisions established by him, though he has made either equal or unequal divisions, conformably to the rules laid down in the *Jeevadum Bhaga Prakarnum*, or chapter of divisions, made by a father in his lifetime. The law regarding this matter is inserted in the answer to the fourth question."

Fourth.—"He that has acquired abundance of wealth may, during his lifetime, divide his estate between his sons as he pleases, either in equal or unequal shares, conformably to the rules prescribed by law; and his sons ought to abide by the division made by him: or should they throw obstacles without so acting, they shall be liable to punishment; which circumstance is stated in the chapter on division made by a father in his lifetime, contained in the *Yajnyawalcya*, *Smriti*, &c. WORKS.—*Yajnyawalcya*: 'If the father make a partition among his sons, he may give, at his pleasure, more to some and less to others; or give the first-born the portion of an eldest son, or divide the estate among all of them in equal shares.' *Nareda*: 'Whether the father distribute equal shares to his sons, or give more wealth to some and less to others, according to circumstances, such shall be their shares; for the father is lord of all.' *Vrihaspati*: 'Sons to whom equal, less, or greater shares have been allotted by their father, should maintain such distribution; otherwise they shall be chastised.'

"By the foregoing texts, it is established, that the father may distribute his estate, among his sons as he

pleases; and that the sons, if they don't attend thereto, are liable to punishment. *Badhayana*: 'Menu distributed the heritage to sons.'

"Let equal shares be given to all without distinction.

"By this very same law, it appears that equal shares alone are allotted to only the father and all the sons, in consequence of a rule, which directs equality, where no other proportion is specified.

"By the foregoing work it is ordained that the distribution to sons in equal shares alone is essential."

Fifth.—"If either the first or the second adopted son resist the lawful orders of his father, and be in enmity with him, he will, in that case, be considered as rebellious to his father. It is ordained by the code of law, that he is not entitled to have a share in the father's estate. The texts respecting this, are as follow. —*Yajnyawalcya*: 'A professed enemy to the father, a degraded man, one deprived of virility, one lame, a madman, an idiot, one born blind, and he who is afflicted by an incurable disease, must be maintained without any allotment of shares.' *Nareda*: 'A professed enemy to his own father, a degraded man, one deprived of virility, and a man formally expelled by his kinsman, shall not inherit though begotten by the deceased, much less if begotten on his wife by a kinsman legally appointed.' In the above-mentioned texts it is ordained that the professed enemy to his own father shall have no share, though he be the son of the body."

The answer delivered by *Ausoory Alaja Singara Charloo*, the *Pundit* of the Provincial Court, in the Centre Division, was as follows:—

First.—"Should a person who, in the first instance, adopted a son, in conjunction with his first wife, and

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who afterwards married a second wife, wish to adopt another son in conjunction with his second wife, he may adopt a second son given, accordingly. This circumstance is specified in a chapter on the distribution made by a father in his lifetime, and also in a section relative to the son given, which are contained in *Jagannatha Tercapanchananum*, *Smriti Chandrika*, &c., law-books, as well as *Etikasam*, *Bharatum*, &c., works. But one who desires numerous issue for other purposes, besides deliverance from hell, may adopt a son given, and others, although he have a son legally begotten. *Sridhara*, *Swami*, and others, have said as above.

" What benefits arise from numerous issue are as follow :—

" Many sons are to be desired, that some one of them may travel to *Gaya*, or perform sacrifice called *Aswameda*, or consecrate a black bull at the funeral.

" Hence sons of various descriptions may be adopted by one who desires numerous offspring.

" The meaning of the foregoing is, that any person may adopt sons given, &c., though he has a son of his body to deliver him from hell. Moreover *Pandu Maha-raja*, who was acquainted with the legal prohibition, obtained *Bhema* and *Arjuna*, and other sons of his wife, from a desire of having a son endowed with strength, and one skilled in jurisprudence and philosophy, though he had a son of his wife called *Dharmaraja*.

" In like manner, as above, many sons given may be adopted, with a view that one of them at least may perform the ceremony called *Gaya Sraddha*, &c., according to the text, which expresses, ' Many sons are to be desired.'

Second.—" The two sons given in adoption, being heirs to the estate of their adoptive father, have authority to divide the estate of their adoptive father between themselves, in the same manner as the two legitimate sons of his own body have a right to their father's estate, and divide it between them.

" The law respecting the above is as follows:—

" An argument of law which is established in one cause is applicable in another, unless a special objection exists.

" *Menu*: 'Distributed the heritage to sons.' *Apastamba*: 'The father, in his lifetime, ought to distribute the property among his sons in equal shares.' *Vishnu*: 'If a father make a partition between himself and his sons, he may give or reserve at his pleasure any part of his own acquired wealth.' *Yajnyawalcya*: 'If the father made a partition among his sons, he may give at his pleasure more to some and less to others, or give the first-born the portion of an eldest son, or divide the estate among all of them in equal shares.'

" According to the opinion of these texts, as equal shares should be allotted, the same rule which was prescribed for the sons of the body, should be established for the sons given."

Third.—" These two sons given, are entitled to inherit their adoptive father's estate, in equal shares, and not in unequal shares; consequently they are to divide the whole estate of their adoptive father in equal shares between them."

Fourth.—" He who acquired much wealth has authority to divide either the whole or a part of his estate between his two sons given, as he pleases; consequently the two sons given, must, of course, conform

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thereto after the death of their father, and they must not deviate therefrom.

"The law for the foregoing is as follows:—*Nareda*: 'Whether the father distributes equal shares to his sons, or gives more wealth to some and less to others, according to circumstances, such shall be their shares, for the father is lord of all.' *Yajnyawalcya*: 'The distribution made by the father is declared binding on sons among whom an unequal division has been made.' *Vrihaspati*: 'Sons to whom equal, less, or greater shares, have been allotted by the father, should maintain such distribution; otherwise they shall be chastised.'

"The meaning of the above text is, that the sons ought to abide by the divisions ordained by their father, though they be equal, less, or greater shares; and that those who act contrary thereto deserve to be punished.

"They are therefore to act according to the rule established by their father."

Fifth.—"No act should be performed contrary to the opinion of the father; consequently, the sons are the masters of the estate of their own shares, allotted to them respectively by their father; and they, therefore, should not wish for a larger or less portion than the above.

"The law for the above is as follows:—'What can be done with that cow which neither affords milk nor becomes pregnant? Of what use is that son who is neither learned nor morally good?

"'A son who has no sacred knowledge, nor courage, nor industry, nor devotion, nor liberality, and who observes not immemorial good customs, must be considered as similar to urine and ordure.' More-

over, there is a verse by *Poorvoo* to *Yayauty*, in their Discourse, in chapter xviii., book ix., of *Sri Bhagavata*.

" ' He who complies with the thought, is the best man. He who complies with the direction given to him, is of a middle class. He who neglects the same, is a low man. He who disobeys it altogether, is similar to ordure.'

" As this is the meaning of the verse, he ought to act according to the rule established by the father, and not deviate therefrom. To act according to the rule established by the father will prove prosperous to both.

" Therefore the two sons given, ought to act according to the determination of their father."

The answer delivered by *Sashadry Sastri*, the *Pundit* of the Provincial Court of the Southern Division, was as follows :—

First.—" If a man, who having in the first instance adopted a boy, as a son given, in conjunction with his wife, should wish to adopt another boy, as a son given, with or without any reason, while the first adopted son is alive, he may do so.

" With respect to the adoption of these many sons given, it is ordained in the work called *Jagannatha Tercapanchananum*, after fully considering, and faithfully quoting, the texts of the sages, *Sancha*, *Lichita*, *Paithinasi*, &c., that if a man, while either the legitimate son of his body, or son given, is alive, wish to adopt many sons, he may adopt many sons given—consequently, the said person is by Hindoo law authorised to adopt another boy as a son given, in conjunction with his second wife."

Second.—" As he has, for some reason, already adopted a second son given, conformably to the Hindoo

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law, the last son given should be considered as son, in the same manner as the first son given. These two sons given, are, therefore, entitled to divide the estate of their adoptive father between them. It is stated, under the article of *Jivadwibhaga* and *Ajivadurbhaga*, in the chapter of divisions, in the books called *Jagannatha Tercapanchananum*, *Menu*, *Vijnyaneswara*, &c., 'that although there are many sons to a father, all those sons are entitled to divide the estate of their father.'"

Third.—"As the two sons have a right to divide between them the estate of their adoptive father, they are entitled to inherit the same in equal shares: as the *veeshamabhagum*, or unequal share, and the *vooddarawibhagum*, or additional share, are by law prohibited, they are not entitled to divide the estate in unequal shares. The two sons, therefore, are each of them entitled to a half-share of their father's property. Thus it is ordained in the chapter of divisions in the books of Hindoo law."

Fourth.—"He who has acquired much wealth is authorised to divide, during his lifetime, either the whole or a part of his estate, in equal shares, between his two sons given. This is stated in the chapter of divisions, in the books of the *Dharma Sastrum*. Divisions thus made by the father, conformably to the law, ought in justice to be in force, after the death of the father."

Fifth.—"If either of the two sons have acted contrary to the desire of their father, either wilfully or deliberately—as the son who has thus acted must be considered a *pitru-dwasi*, or enemy to his father—he is declared in the article of *nedatra putra*, or guilty son, in the chapter of divisions in the works of

Vijnyaneswara and other law books, not entitled to a share."

Upon the receipt of the above opinions, the Provincial Court recorded the following resolution :—

"The Court, meeting, in the above opinions, with adequate grounds for recognising *Ramanadha*, the second adopted son of the late *Vencatadry*, as a claimant to a moiety of the estate, left by that *Zemindar*, the whole of which has been claimed by the elder adopted son, *Jaganadha*,—It is resolved, that one-half of the amount of the above instalments shall be immediately paid to *Jaganadha*, upon his passing his receipt for the same, and that his pleader be directed to communicate to him this resolution of the Court accordingly."

Jaganadha declined to receive the moiety thus awarded to him, and, by a subsequent order, the whole of the monies in Court were directed to be applied in discharge of a debt due from *Vencatadry's* estate.

On the 9th of *September* 1819, the *Sudder Adawlut* pronounced judgment, in the Appeal, which had been presented to them by the Collector of *Guntoor*, and thereby declared, that the Collector was justified in retaining possession of the 208 villages, until he should receive legal authority for delivering them up, and reversed the decision of the Provincial Court; and they adjudged *Jaganadha* to pay the costs in both Courts: but they further decreed, that, as he had obtained possession of the villages in question, under the decree of the Provincial Court, he should continue in possession thereof, upon giving security to abide the issue of any suit which might be instituted by the other claimant, *Ramanadha*, to try the question of right to the villages.

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In pursuance of this decree, *Jaganadha*, having given the required security, continued in possession of the villages, as well as of the rest of the estate of the late *Vencatadry*.

On the 8th of *November* 1820, *Ramanadha* filed a plaint, in the Provincial Court for the Northern Division, against *Jaganadha*, in which he stated the circumstances of his adoption; and after alleging that a legal and conclusive apportionment and division of the *Zemindary* property in question had been made by the late *Vencatadry*, in his lifetime, whereby that part of the property, called *Chattoor-mooka-Patnam*, had been allotted to him, *Ramanadha*, solely; and all title, claim or right of interference therewith, by *Jaganada*, had been thereby excluded; and after stating that, of the 208 villages sequestered by the Collector of *Guntoor*, and afterwards delivered up to *Jaganadha*, 127 villages belonged to the district *Chattoor-mooka-Patnam*, and also stating that *Jaganadha* had dispossessed him of six *lunkas*, or islands, which had been under his management; the plaint sought the recovery of the one hundred and twenty-seven villages under the *Guntoor Zillah*, and six *lunkas*, or islands, under the *Masulipatam Zillah*, with the profits, &c., derivable therefrom, amounting to *Madras pagodas*, 976,915. 6. 4½., then in the possession of *Jaganadha*.

Jaganadha, in his answer, insisted on his title as the adopted son of the late *Vencatadry*, and traversed *Ramanadha's* claim by virtue of the second adoption, insisting that the same, if made, was invalid by law. And he submitted that *Ramanadha* could take no share of the late *Vencatadry's* estate, and that whatever acts the late *Vencatadry* might have done in

his, *Ramanadha's*, favour, they, being contrary to the Hindoo law, were null and void.

Evidence was entered into on both sides.

On the 16th of *June* 1824, the Provincial Court made their decree, declaring, that there was no reason to doubt that *Vencatadry* had adopted both the Plaintiff and Defendant, as his sons, in a manner perfectly regular, so far as forms and ceremonies were concerned; but the Court observed, that the main question in the cause was, whether, previous to the adoption or even the birth of the Plaintiff, *Vencatadry* had not disqualified himself from alienating any part of his property, to the prejudice of the Defendant; for that on the occasion of the adoption of *Jaganadha*, his natural and adoptive fathers exchanged correspondent engagements, the genuineness of which was not called in question by the Plaintiff, and was proved by the unimpeached testimony of the subscribing witnesses; and the Provincial Court being of opinion, that this was a conclusive and utter bar to the Plaintiff's claim, disallowed his claim, and dismissed the suit with costs.

The Provincial Court having refused to re-hear the case, on a petition for review of judgment, *Ramanadha* appealed to the *Sudder Adawlut* of *Madras*.

Pending this appeal, and on the 28th of *February* 1825, *Jaganadha* died, leaving two widows, *Atchama* and *Rungama*; but no issue him surviving.

At the time of his death he was not living with *Atchama*, his senior wife. It appeared that she had left his house in 1819, in consequence of differences having arisen between them. These differences were stated by *Atchama* to have originated in the influence exercised by *Rungama*, the junior wife, over the late *Jaganadha*, which had led, in *Jaganadha's* lifetime,

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to various hostile proceedings, on the part of *Atchama*, being taken against him.

On the 10th of *March* 1825, *Ramanadha* applied by motion, for leave to withdraw his Appeal, on the allegation that, having been appointed heir by the Will of the late *Jaganadha*, he had taken charge of the whole of the estate, and he prayed that a precept might be sent to the Provincial Court, for the Northern Division, directing them to put him into possession of the disputed villages.

On the same day, a further motion was made by *Tirmul Row*, the *Vakeel* of the late *Jaganadha*, for the like purpose, which was supported by two letters, one of which was represented to be a letter from the late *Jaganadha* to *Tirmul Row*, declaring that he had appointed his brother *Ramanadha*, his heir, to succeed to his estate, both real and personal; and the other a letter from his junior widow, *Rungama*, to the same effect. The Court, however, refused to receive any representation from *Tirmul Row*, the *Vakeel*, on the ground, that the death of *Jaganadha* had rendered his authority void; and, in compliance with the motion made by *Ramanadha*, ordered the Appeal to be struck off the file, but refused the application for a precept to the Provincial Court as altogether inadmissible.

On the 28th of *April* 1825, *Ramanadha* presented two petitions to the *Sudder Adawlut* of *Madras*, for the same object: these petitions were accompanied by the alleged Will of the late *Jaganadha*, and a petition presented by the junior widow, *Rungama*, of the same purport as the letter previously produced by *Tirmul Row*.

On the 12th of *May* 1825, before the *Sudder* Court

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had pronounced any decision on these petitions, *Atchama* appeared as a claimant of the whole property of *Jaganadha*, by presenting a petition to that Court, claiming as senior widow, and chief heir, of *Jaganadha*; and charging *Rungama* and *Ramanadha* with collusion, and praying that the petitions which had been presented in their names might be rejected, and that she might be put in possession of the *talooks* in question. In proof of her title, she enclosed in her petition, certain documents; one of these was a Will, which she represented to have been written by the directions of *Jaganadha*, on the 1st of *February* 1825, which purported to be as follows:—"You are my elder wife, and *mookya curta* (chief heir) to the whole of my property: and notwithstanding I formerly behaved myself ill towards you, in consequence of the ill persuasions of my second wife, you have, with your best wisdom, conducted yourself towards me with obedience and sincerity, and, also, you are capable to manage the affairs of the *talooks*, and to transact other matters. Under all these circumstances, I appoint you, according to the law, to be my heiress and successor to all the *talooks*, on both sides of the river *Kistna*, being my paternal *Zemindary*, to all my property, real and personal, and to conduct the suits pending in Courts, being instituted by and against me."

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The other document purported to be a note from *Jaganadha* to *Atchama*, and contained the following passage:—"*Rungama* troubles me much to leave, by writing, the *talook*, &c., to *Chava Lutchmeputty*, of another *gotrum*, whom she, *Rungama*, has been taking care of; but I have not consented to it. Upon a reflection of my illness, I think I shall not live many

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days. Since she is thus troubling me while I am alive, she may, in conjunction with the servants, very likely forge something hereafter, the seal being in her possession. Therefore as soon as you see this note you will come here, and take care of the *talook* and other estate, according to my writing to you."

On the 23rd of *June* 1825, the *Sudder Adawlut* made an order on the foregoing petitions, which, after directing *Atchama* to institute a suit against *Ramanadha*, for the recovery of the entire estate of the late *Jaganadha*, proceeded as follows: — "The *Sudder* Court do not consider that *Ramanadha* ought, in equity, to be prejudiced by the withdrawal of his Appeal from the decree of the Provincial Court, which act appears to have been done under an erroneous impression of the legal consequences, resulting to him, from the death of the late *Jaganadha*. The Provincial Court will, therefore, with reference to the circumstances under which this Appeal was withdrawn, consider the claim of *Ramanadha*, to a moiety of the estate of the late *Vencatadry*, not to be finally adjudicated; but in determining the suit to be brought under the present instructions of the Court, the Provincial Court will confine their judgment to the new points which may be raised (proceeding on the supposition that their former decision may be reversed). In the event of judgment going against *Ramanadha*, the case can, on Appeal, be brought in all its bearings before the *Sudder* Court, to whom, under the circumstances, it will be competent to read the record in the former Appeal, and make it a part of the latter. The Court infer their competency so to proceed, from the fact, that the parties before them will, to all intents and purposes, be the same, inasmuch as *Atchama* de-

rives her title from her deceased husband, and would have been concluded by any other judgment which might have been passed against him in the Appeal. If, on the other hand, judgment should go in favour of *Ramanadha*, the claim which formed the ground of the suit will merge in such decision, and the revival of that question be no longer necessary."

In pursuance of this order, *Atchama*, on the 15th of *August* 1825, filed her plaint in the Provincial Court for the Northern Division, against *Ramanadha*, claiming the whole estate of *Jaganadha* as his senior widow, and sole heiress, he having no issue male; and she further alleged that *Jaganadha* had caused a paper to be written, dated the 1st of *February* 1825, whereby he directed that all his estate should be inherited by her, being his real heiress and successor, both by law and the usage of the country, and she claimed as such accordingly; and cited various authorities in support of her title, as sole successor to the entire estate of her husband. She also charged *Ramanadha*, in conjunction with *Rungama* and others, with having combined and fabricated the paper, which they pretended was the Will of the late *Jaganadha*, and submitted that such paper could not be admitted to proof, it not having been executed on stamped paper, as required by Regulation XIII. of 1816.

Ramanadha, by his answer, did not dispute the fact of the Plaintiff having been, by marriage, the eldest wife of the deceased *Vencutadry*; but he alleged, that the Plaintiff did not conduct herself becomingly, and was in consequence forsaken by her husband; and he insisted, for the first time, that he was the undivided brother of the deceased *Jaganadha*, and that as he had died without issue, he, the Defendant, became the sole heir

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to his whole estate, and was also heir to *Vencatadry* by lineal descent; he claimed, moreover, to be entitled to the estate by virtue of the Will in his favour, alleged to have been executed by *Jaganadha*.

Atchama, by her reply, denied the allegations contained in the answer, and insisted on her title as senior widow and heiress of the late *Jaganadha*.

On the 12th of *December* 1825, the Court propounded the following question to the Hindoo law-officer attached to the Court:—

"A *Zemindar* of the fourth caste, called *Rungapah*, died, leaving much hereditary property, but no issue, male or female. He had adopted a son, called *Venkiah*, who also died some years after his adoptive father, leaving the same hereditary property, but no issue, male or female. He left, however, two widows, the senior of whom is called *Lutchmiah*; she now comes into Court, and claims the entire estate, real and personal, of her late husband *Venkiah*, asserting that she is his legal heir, according to Hindoo law. Her claim is resisted by one, called *Reddapah*, who is the great grandson of *Naganha*, who was the grandfather of *Rungapah*; he (*Reddapah*) asserts that, there being no other or nearer male relation than himself, he is the legal heir, according to Hindoo law. You are required to state which of these two claimants, *Lutchmiah* or *Reddapah*, is the legal heir to the hereditary property left by *Venkiah*, supposing it to be true, that there is no other or nearer male relation than *Reddapah*."

To this question the following answer was returned by the *Pundit*:—"According to the Hindoo law, *Lutchmiah*, the eldest widow of the late *Venkiah*, is, in the first instance, legal heiress to both the landed and personal estate, left by the said *Venkiah*, who

was the adopted son of *Rungapah, Zemindar*, of the *Soodra* caste. Regarding this, the *Dharma Sastrum* is as follows.:—*Vrihaspati* says, 'A wife is declared by the wise, to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased, half the body survives. How should another take the property while half the body of the owner lives?' *Yajnyawalcya* says, 'A wife, daughters, both parents, brothers, their sons, kinsmen sprung from the same original stock, distinct kindred, a pupil, and a fellow-student in theology. On failure of the first of these, the next in order shares the estate of the deceased.' *Katyayana* says, 'The childless widow, preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents, may frugally enjoy the estate, until she die; after her, the legal heir shall take it.'"

The Court made its decree in this suit, on the 22nd of *December* 1825, in which they rejected the alleged Will relied upon by *Ramanadha*, both because it was upon unstamped paper, and also because, if genuine, it would have been, by the Hindoo law, invalid; and the Court expressed its opinion, that there appeared to have been nothing in *Atchama's* conduct which could bar her claim, as senior widow of *Jaganadha*. Having read the answer given by the *Pundit*, the Court observed, that from the texts there stated, as well as certain others, it appeared that the wife was the heiress, to the whole of her husband's estate, after his demise, and that after her the nearest cousin was heir to it. On the ground, therefore, of the opinion of their law-officer, the Provincial Court decreed to the Plaintiff, as the legal heiress of her late husband, possession of the property in general, real and personal.

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From this decree, *Ramanadha* appealed to the *Sudder Adawlut* of *Madras*.

On the 6th of *September* 1826, *Rungama*, the junior widow of *Jaganadha*, instituted a suit in the Provincial Court for the Northern Division, against *Atchama*, *Ramanadha*, and *Puttoory Caly Doss*, as the adoptive mother and guardian of one *Lutchmeputty Naidoo*, as the adopted son of the late *Jaganadha*, and on his behalf claiming the whole of the property in question. In her plaint, she alleged that her deceased husband, *Jaganadha*, being childless, and not likely, from bodily infirmity, to have issue, in the month of *April* 1819 directed her to apply to one *Chava Naidama*, a relation of *Jaganadha*, but not of the same *gotrum*, to know if he would give his third son, *Lutchmeputty*, then an infant, in adoption to *Jaganadha*. That on the 26th of *April*, in the same year, *Chava Naidama* signed an instrument, giving his son to *Jaganadha*, who, on the same day, by an instrument executed on his part, accepted the boy in adoption, with her, *Rungama's*, concurrence, (*Atchama* having left her husband,) making him heir and successor to his estates: and that on the 18th of *August* 1819, the further ceremonies of adoption were performed in favour of *Lutchmeputty*, who was brought up at *Amavarti*, (*Jaganadha's* house,) as his son, and acknowledged as such to the neighbouring *Zemindars*, and to Mr. *Charles Roberts*, the then Collector of the *Zillah* of *Masulipatam*. That after *Jaganadha's* death, *Ramanadha* had executed a deed, called a *karar-namah*, acknowledging *Lutchmeputty*, as such adopted son, and that he only held possession for him, as manager. That she, *Rungama*, was imposed upon by *Ramanadha*, and induced to execute papers, of the purport of

which she was ignorant. That *Jaganadha* made a Will in her favour, and that the Wills relied upon by *Atchama* and *Ramanadha* were forgeries; and she charged *Ramanadha* with combining and confederating with *Puttoory Caly Doss*, the *Dewan*, or head manager, of the late *Vencatadry*, and *Jaganadha*, to suppress the fact of *Lutchmeputty's* adoption, and otherwise inducing her to execute the instruments before mentioned.

On the 25th of *January* 1827, before the answers were put in, *Rungama* presented a petition to the *Sudder* Court, praying to be admitted a joint Respondent to the Appeal, then pending before that Court, between *Ramanadha* and *Atchama*. To this application, both *Atchama* and *Ramanadha* filed counter-petitions, denying the title of *Lutchmeputty*, and praying for the rejection of *Rungama's* petition.

Upon considering these petitions, the Court was of opinion, that the interests of justice would be best consulted, by the suit brought by *Rungama* being called on as early as possible for trial, and by postponing the decision of the then pending Appeal, till the result of that trial should be known. The Provincial Court was, therefore, directed to proceed to the trial of *Rungama's* suit, without reference to its order upon the file of the Court.

On the 15th of *May* 1828, *Ramanadha* filed his special grounds of appeal from the Provincial Court's decree, in the suit instituted by *Atchama*, in which he insisted on the various circumstances stated by him in the proceedings before taken, and added a claim to the estate of the late *Jaganadha* on account of his having died without issue, suggesting that, according to the custom of his family, a female was incapable of pre-

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siding, and that *Atchama* had no title, and could not succeed to the *Zemindary* of the late *Jaganadha*.

Atchama, by her answer to these special grounds, denied the various allegations contained in *Ramanadha's* reasons of Appeal, and insisted on her title, as the senior widow of the late *Jaganadha*, to succeed to the whole of his real and personal estate.

Pending these proceedings in the *Sudder* Court, *Rungama's* suit in the Provincial Court, against *Atchama*, *Ramanadha*, and *Puttoory Caly Doss*, proceeded.

Ramanadha, by his answer, insisted that the whole story of *Lutchmeputty's* adoption was a fabrication; and not only stated the fact of there being several male children in the immediate branches of the family, capable of being adopted, but maintained the existence of *gotrums* among *Soodras*, and represented *Lutchmeputty* to have been of a different *gotrum* from *Jaganadha*. He also insisted on the invalidity of any adoption out of the common *gotrums* of both parties; and stated the *Chava-var* to be a family so far inferior to that of the *Vassareddy-var*, as not to permit of alliances being contracted between them; he also traversed the alleged communication by *Jaganadha* of the adoption, to the authorities, insisting on the natural inference arising out of the non-communication, particularly in the instance of *Jaganadha*, who he represented was well aware of its necessity. He denied the existence of the alleged Will, and the contemporaneous documents said to have been suppressed, and the conspiracy charged against him and *Puttoory Caly Doss*, and insisted on the genuineness of the various papers connected with his proceedings for obtaining possession, and in particular of the Appellant's sig-

nature to them, and actual dictation of their contents. He represented the Plaintiff to have herself addressed a letter to the Collector of *Guntoor*, on the 4th of *July* 1825, praying him to return to her the Will left in his favour by *Jaganadha*, for the purpose of being produced to the Provincial Court, and to have sent it by her *vakeel* separately with a *vakalut-namah* executed by her to him, authorizing him to present the same *arzee* to the Collector, and subsequently to have produced the original Will, through her pleader, to the Court. In further contradiction of the alleged imposition on the Plaintiff, he stated, that he was residing openly with *Rungama* in the house, while publicly assuming the proprietorship, performing, in his own name, his brother's funeral rites, and defending *Atchama's* suit; and he wholly denied the execution by him of the alleged *karar-namah*, admitting *Lutchmeputty's* title, and undertaking the management on his behalf.

The Respondent, *Puttoory Caly Doss*, by his answer, insisted that the circumstance of *Ramanadha's* possession of the *Zemindary* was open and notorious, and that the whole of the Plaintiff's statements respecting him, *Puttoory Caly Doss*, were unfounded and untrue.

Atchama, the senior widow, by her answer, insisted, that the Will alleged to have been made in favour of *Rungama* was fabricated, and that the alleged adoption of *Lutchmeputty* was a fiction; stating, that at the time when such adoption was alleged to have taken place, *Jaganadha* was only twenty-two years of age, and likely to have had issue of his own, and that there were nearer relations, from whom he would have made the adoption, if he had intended to adopt a son; and denying that *Lutchmeputty* had ever been acknow-

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ledged by him, as a son, and she insisted on her own title as the elder widow, and stated, that in fact, a Will had been made by *Jaganadha* in her favour, and that for a long time *Ramanadha* and *Rungama* had been acting together, and that, by arrangement between them, the former had been let into possession of the estates.

To these several answers *Rungama* replied, and the Defendants rejoined.

The Provincial Court, after considering the pleadings, declined receiving evidence, and, on the 11th of *May* 1827, made a decree, in the cause, dismissing the suit with costs. Mr. *H. Lord*, the Second Judge, in his opinion, observed, "The authenticity or spuriousness of the Will, about which so much has been said in the Plaintiff's petition, is a point of very little importance to the Court. Wills are not known among the Hindoos, and cannot possibly be of any importance, whether genuine or forged: the law makes the Will of an Hindoo. If, therefore, the Will be in conformity to the law, it is supererogatory; if it be contrary, whether genuine or not, the bequests can never be carried into execution." He then noticed the circumstances which he considered to indicate an attempt to deceive the Court, and proceeded thus:—"This foolish attempt at deceiving the Court, or persuading them to believe that the whole proceedings referred to, have been done without the knowledge of the Plaintiff, is only to be equalled by the more absurd reason for her bringing this action, namely, as the guardian and adopted mother of *Lutchmeputty*. The falsehood of this statement is too notorious to admit almost of any serious observation. The Plaintiff alleges that the adoption took place so long as 1819; and it must be

acknowledged as an extraordinary circumstance, that it should have remained a secret until 1826; although two suits, for the possession of the whole estate of *Jaganadha*, had already been decided by this Court, and one, which had been appealed from, withdrawn with the direct assent of the Plaintiff. The adoption, therefore, has evidently been an after-thought of the Plaintiff's own, or of some of her advisers, who expect to benefit by the cause; for not a word has appeared, respecting the adoption, in the two former suits, nor probably would it now have been assigned as a reason for claiming the estate, had not the Collector of *Masulipatam* inadvertently written to the Board of Revenue, that *Jaganadha* had paid him a visit accompanied by his adopted son. Whether it ever was the intention of the Plaintiff's husband to have adopted this boy, cannot now be determined, but it is incontrovertibly true that he never did adopt him. If this ceremony had been performed in 1819, it would have been impossible to conceal the event, even if it had been desirable: but it is a measure of such importance, in a family of rank and wealth like that of the *Vassareddyvar*, as to form the subject of addresses to the Government, to the Board of Revenue, to the judicial officers, and, in fact, to all public authorities, likely to have any concern with the *samastanum*: none of these public communications have ever been made, nor has information on the subject even incidentally reached the Collector of *Guntoor*, or, what may be more extraordinary, any of the native population. I am not prepared to say, that the Plaintiff may not have numerous adherents to swear to the adoption, but this, even if permitted, would not convey to my mind any proof that it had occurred. The ceremonies attending the

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adoption could not be performed secretly, nor could they be performed without the assistance of numerous hands. As has been said before, witnesses to swear to those points may be in readiness, and I have no doubt they are: for the Plaintiff has enumerated some of the ceremonies in her plaint, to which these witnesses may be called to swear; but I am of opinion, that not a single testimony on the point should be taken. The Court, by examining witnesses, would in fact be lending its authority to perjury." Mr. *J. O. Todd*, the Third Judge, in concurring with the decree pronounced by the Second Judge, also recorded the following opinion:—"This cause ought to be dismissed at the present stage of the proceedings. It is obviously frivolous and groundless. We should be wanting in respect to ourselves, nay, more, we should wilfully connive at perjury, if, with our knowledge of the circumstances of the case, we were gravely to proceed to the examination of witnesses, in proof of the impudent and palpable falsehoods alleged in the plaint."

From this decree, *Rungama* appealed to the *Sudder Adawlut* of *Madras*.

On the 22nd of *October* 1829, the *Sudder Adawlut* of *Madras* made their decree, in that appeal, in which the Court noticed that the pleas of *Rungama*, in her suit, might be distributed under two principal heads, viz.:—first,—those relating to the imposition alleged to have been practised upon her by *Ramanadha*, assisted by *Puttoory Caly Doss*; and secondly, those relating to the alleged adoption of *Lutchmeputty*, by her late husband and herself conjointly, these being matters of fact, which could be determined only upon evidence; the Court then, after observing with disapprobation upon the decree of the Provincial Court, proceeded

as follows :—" In the pleadings filed in this Court on behalf of *Rungama*, complaint is very justly made of the prejudication of the evidence, which she had to adduce, as tending to deter her witnesses from appearing before the Provincial Court, and upon this, as well as other grounds, she renews her application that her suit may be called up for trial before this Court. Notwithstanding the weighty objections, to which such a measure is open on many accounts, the *Sudder* Court would be inclined to accede to her application ; but as there are now on the Bench of the Provincial Court, two Judges who were nowise concerned in the previous proceedings in this case, the Court are satisfied that the transfer of the original suit to the Presidency is not necessary for the ends of justice, and is unadvisable, as subjecting the witnesses to great inconvenience, and the parties to great additional expense."

The Court, therefore, ordered the Provincial Court to re-admit the suit, and to try and determine it *de novo*.

In obedience to this order, the Provincial Court proceeded to try the cause.

A great mass of evidence, both oral and documentary, was produced by *Rungama*, for the purpose of proving the actual performance of the ceremonies of adoption of *Lutchmeputty*, by *Jaganadha* and *Rungama*, and of his being brought up as *Jaganadha's* son. It appeared that the fact of such adoption was not formally reported to the Government authorities, according to the usual course, but that on several occasions *Jaganadha* visited Mr. *Roberts*, the Collector of *Masulipatam*, accompanied by *Lutchmeputty*, whom he represented to be his adopted son. *Rungama* put in evidence certain letters alleged to have been written by *Jaganadha* to

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her; in one of which, *Jaganadha* mentioned the subject of the adoption: together with questions put to the *Pundits*, respecting the legality of the adoption, and the answers thereon: she produced, also, the papers alleged to have been executed, on the occasion of the adoption, between *Jaganadha* and *Lutchmeputty's* natural father; the alleged Will made in favour of *Rungama*; and the *karar-namah* executed by *Ramanadha* to *Rungama*, acknowledging *Lutchmeputty* as *Jaganadha's* adopted son, and for whom he acted only as manager. The material part of this evidence is stated in the decree of the Provincial Court.

To rebut this evidence, *Atchama* entered into proofs, both oral and documentary, at great length. Evidence was also produced, on the part of *Ramanadha*, and *Puttoory Caly Doss*.

On the 5th of *July* 1830, the First and Third Judge, Mr. *G. Barron* and Mr. *S. Money*, delivered the second decree of the Provincial Court, in the suit, and after fully reviewing the evidence, Mr. *G. Barron* expressed his opinion, as follows:—

"The foregoing examination shows that this question of adoption has been brought forward under very suspicious circumstances. There are many facts that speak against it, independently of the testimony of the witnesses, all of which will be noticed. There are no want of witnesses to speak to the fact of adoption; but it is to be seen, whether what they depose will bear the test of strict scrutiny and comparison; in a question of so much importance as the present, there will be found no difficulty in finding persons to speak to the simple fact of a ceremony of adoption having been performed: for instance, the Plaintiff's first witness is completely master of his subject; he is present at

every ceremony, from the marriage of *Jaganadha*, twenty-seven years ago; he is prepared for every doubt and objection; he is the leader, and all the rest follow, bearing witness to some one point or more that he has deposed to; taking the evidence, therefore, for the Plaintiff, as it stands, the adoption might be considered as proved; but there are several difficulties, that oppose themselves to the admission of this as a fact.

"The Plaintiff referred to letters from Mr. *Roberts*, the Collector of *Masulipatam*, addressed to the Board of Revenue on the 3rd and 27th of *March* 1825, wherein he speaks of an adoption. I do not consider it to be evidence, but the Plaintiff may have the benefit of it. Mr. *Roberts* says: 'The *Zemindar* has left two wives and a child, which he stated to me, some time since, to have adopted:' and again, 'The deceased, *Jaganadha*, was preparing to return to *Amaravaty*; he received permission, on making the request, to wait upon me: he took that opportunity, he observed, of presenting me his adopted son, *Chava Lutchmeputty*; from what he then stated, I felt fully assured that the adoption had taken place, and I have been given to understand that the boy has been presented in the same manner to several *Zemindars*, the friends of the late *Jaganadha*, whom the child was in the habit of addressing as his father:' again, 'If adoption can be effected by Hindoos (not being Brahmins), by the public acknowledgment of the heir, and which I believe to be admissible, the young *Chava Lutchmeputty*, by a residence of some years with the deceased *Zemindar*, attended with a peculiar degree of affection which was manifested towards him, and his public presentation, as the adopted heir, may claim, I conceive, to be considered his heir, and which the paper called a Will tends to prove.'

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What the Board of Revenue said to this does not appear, but it could have had no weight with them, for *Lutchmeputty* was not acknowledged, and *Ramanadha* was put in possession of the *Zemindary*. Mr. *Roberts*, it would appear, made this report upon the strength of what *Jaganadha* had said to him, and he must have taken the whole of what he so reported upon credit; but that gentleman appears to have formed an unusual idea of adoption among Hindoos, that a public acknowledgment of him as heir, and by a residence of some years with the *Zemindar*, and being treated with affection, gives a claim to be considered the heir. Now the act of adoption is one of the most sacred rites a Hindoo can perform, and it is not a mere avowal or acknowledgment of adoption that constitutes the act, or constitutes the heir. In his testimony he says that he is acquainted with the necessary formula of the law of adoption, as contained in the general summary of the Hindoo law, by *Colebrooke*, but made no particular inquiry as to what formula were used on the occasion. Mr. *Roberts*, throughout his evidence, admits that his conviction, respecting the adoption, was obtained entirely from *Jaganadha's* own communication of it. He states, that his conversation was in Hindustani, with *Jaganadha*, and that the word '*dhut*' in the Hindustani means adopted son, and that '*paluk*' means the bringing up of a boy. Now '*dhut*' is not a Hindustani term, it is *Sanscrit*: and if *Jaganadha* conversed in that language, (Hindustani,) he would have used the latter term; for there is no adoption under the Mahomedan law, upon the footing that it is among the Hindoos, and they have no term by which they could convey the idea of an adoption, as performed by Hindoos. The word '*paluk*' or *palacu*, to bring

up or foster, is of a general nature, and would mean no more than that I am bringing up a boy; that this boy should have been treated with kindness, is accounted for by the fact, that *Rungama* and *Lutchmeputty* are sisters' children, and it was very natural, that, having no children of her own, she and *Jaganadha* should foster this child. There must be some more substantial evidence of adoption than this simple fact, and *Jaganadha's* verbal communication to Mr. *Roberts*.

"Mr. *Oakes*, in his testimony, declares, to the best of his recollection, that *Jaganadha* never made any communication to him, verbally or in writing, of any intention of adopting a son. Now this gentleman was Collector of *Guntoor*, from 1811 to 1821, and *Amaravaty*, the *Zemindar's* place of residence, under his jurisdiction. Why should he omit giving to the Collector, with whom he had a constant intercourse, a piece of information so important, if really he had formally adopted this boy, with a view to his performing his funeral rites, and becoming heir to his estate? Mr. *George Russell*, who was also Collector of *Masulipatam*, from 1812 to 1821, recollects no communication having been made to him by *Jaganadha*, of his having adopted a boy.

"Mr. *Whish*, the present Collector of *Guntoor*, in a letter to the Board of Revenue, dated the 20th of *July* 1826, says as follows:—'The boy *Lutchmeputty* did accompany the *Zemindar* one day on a visit to me; but it did not appear that he looked on him as his adopted son, although questions and answers passed as to who he was.'

"If this boy had really been adopted by *Jaganadha*, according to law, it is natural to suppose, as it was

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necessary, that such communication should be made to those authorities, under whose cognizance alone the boy could be acknowledged as heir. I rather think, that whatever *Jaganadha* might have told Mr. *Roberts*, he never meant to give him to believe that *Lutchmeputty* was lawfully adopted. Mr. *Roberts* must have misunderstood him: and this is the more likely, as *Jaganadha*, like Mr. *Roberts*, was talking a language not his own, and of a thing for which there was no corresponding term in the dialect in which they were talking.

"When this adoption is said to have taken place, viz., in 1819, *Jaganadha* was only twenty-four years of age, and *Rungama* twenty; *Atchama*, a year or two more. It appears that *Atchama* left *Jaganadha* at the very time, as will hereafter be shown, that *Jaganadha* is said to have been contemplating an adoption. *Rungama* admits that she had twice conceived, but had not brought to the birth; and her first witness supports her assertion. The second Defendant's fourteeenth witness declares *Rungama* to be a woman of a superior description. *Jaganadha* was in good health, although corpulent, and there were no just grounds for him, or for *Rungama*, to come to any conclusion that they could have no more children, for there were acknowledged proofs that neither of them was sterile; therefore there was no necessity for them to adopt a boy at that time. The Plaintiff's first, seventh, and thirteenth witnesses, however, declare that *Jaganadha* was in a bad state of health, and the seventh witness enters very minutely into its nature; but the Plaintiff's witness, Mr. *Roberts*, says he was in perfect health when he saw him. Mr. *Russell* says that he was corpulent and apoplectic in appearance; but he did not die of apo-

plexy. Mr. *Oakes* says he was in health; and several of the Defendant's witnesses state that he was in a good state of health.

"Although it is not conclusive against the adoption, there is ground for strong presumption, that it never took place, as alleged, because the necessity for it did not exist. It is not reasonable to suppose, that a young man of four-and-twenty, and a young woman of twenty, who had been twice pregnant, would despair of having children, and have recourse to an act which none but the sterile and old resort to.

"There are other circumstances which go against the adoption; the peculiar circumstances under which *Jaganadha* and *Rungama* were, at the precise period of time that it was contemplated and took place. It is stated that, on the 26th of *April* 1819, *Jaganadha* and *Rungama* went from the village of *Ragavapoorum* to that of *Eralapaudoo*, where the father of the child lived, and that they brought him away from thence, and returned to *Amaravaty*; that it was on the 21st the question was put to the *Pundits*, and on the 23rd they gave their answers. On the same day *Jaganadha* sent a copy of it to *Rungama*, who was at *Ragavapoorum*, and he followed on the 25th. All this is very clear, but it is decidedly contradicted by the Defendant's witnesses, who declare that *Jaganadha* was at that time at the village of *Nataky*." The learned Judge then entered upon an examination of the evidence, respecting this fact, and proceeded:—

"I have gone through the whole of the evidence, and the documents, touching the question of adoption; and supposing it to have been performed, as averred, the Plaintiff has yet to overcome two objections to the validity of it. The first of these, is, if the adoption of

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a child from another *gotrum* is an act contrary to law? I apprehend the law is restrictive to Brahmins, and that not penally; a Brahmin may adopt from another *gotrum*, if he cannot find a boy in his own, and so may a *Soodra*; there is no penalty, as far as I can learn, for the deviation; but why should *Jaganadha* take a child from another family, if one of his own *gotrum* could be had? It is difficult to understand that he should be led by any ordinary impulse to cut off the inheritance from his own, and an ancient family, and divert into one that was inferior. If *Jaganadha* can be supposed to have had any feeling on such a point, it may be inferred, that he never did what he is alleged to have done, and that this adoption has been a subsequent plea got up, and that the selection of this boy was influenced by *Rungama* not being able to get one of the *Vencatadry-var's gotrum*, and not because there were none of that family.

"The first Defendant's third witness has stated, that the Plaintiff sent a letter to *Vassareddy Chinna Vencatadry Naidoo*, after *Jaganadha's* death, and after the decree was passed in favour of *Atchama*, for one of his sons in adoption, who refused doing it. The fourth and sixth deposed to a similar effect; but this individual is not a witness in this case. Where evidence is so easily obtained, I should be disposed to attach no great degree of credit to their testimony, if the assertion of there being no suitable child of *Jaganadha's* own *gotrum* were otherwise well supported. The Defendants have maintained, and endeavoured to prove, that there were several families of the same *gotrum*; and it is certainly very probable that there were. *Lutchmeputty* being *Rungama's* mother's sister's son, and brought up in the house, offered a more convenient

object than any other. If this question of adoption was concocted to set aside the claims of *Atchama* and *Ramanadha*, the boy's connections would naturally support it with the whole weight of their countenance and evidence.

"I come now to the last objection against the adoption. The rite of adoption is a sacred one among the Hindoos; it is of a spiritual nature; and the Hindoo law is very pointed as to the reasons and object of adoption, and declares it to be for the sake of the performance of the funeral rites of a man having no male issue, and to perpetuate his name; inheritance follows of course, but it is a secondary consideration. In the present case it appears to be primary. It is laid down, among other necessary provisions for the legality of the performance of it, that it shall be done in concert with his wife, and, if having two, with his elder wife; it is very clear, and admitted, that *Atchama*, who was the eldest, was neither present nor consulted. On this ground, therefore, it is strongly objected that the adoption was illegal. It is not necessary to recapitulate what the law is, but it is not denied; *Rungama*, however, endeavours to surmount this difficulty, by affirming two points; first, that there was no precedency between them; that they were both married at the same time; and the first witness ingeniously enough attempts to explain how certain ceremonies could be performed by one husband, at one and at the same moment of time, upon two wives, which ceremony would constitute superiority in the one with whom it was first performed. *Atchama*, being the eldest in years, would have precedence, not only as being the one with whom marriage would naturally be first consummated, but seniority in point

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of age would give it to her. Whether this disputed claim gave rise to animosities and rivalship between the wives, or whether this equality is an assumption of more recent date to meet the objection, does not appear in evidence. This claim to equality I do not feel disposed to admit. It is nowhere mentioned in the law, as far as I can recollect, that there exists an equality, for it speaks of first and second wife; it is more natural, and consonant to the world's usage, to give precedence to age. My opinion is, therefore, that *Atchama* must be considered the elder, and taking precedence, and she is the wife for whom the Hindoo law has provided certain privileges.

"But, as if this were not tenable, *Rungama* maintains, that *Atchama* had forfeited these privileges, by having been abandoned by *Jaganadha*; and this abandonment is proved by several witnesses. This point, however, is not contested; but the cause of this disunion, as far as a legitimate reason is required, is not discovered; it was said that she was disobedient, but the character of that disobedience is not collected; not one witness accuses her of any specific act; her honour and virtue are not impugned; it is only, therefore, that incompatibility of temper can be laid to her charge, but that will attach equally to *Jaganadha*. *Rungama*, however, produces a document, which purports to be a letter from *Jaganadha* to *Rungama*, dated 14th of *April* 1819, while he was at *Nataky*, and she at *Ragavapoorum*, and pending the period of seeking for the boy, and that *Atchama* was before the magistrate at *Guntoor*, preferring her complaint against *Jaganadha* for maltreatment: he therein insinuates that something had occurred, which he did not follow up, on account of *Antanah Puntooloo's* ad-

vice, that it would be difficult to produce proofs, and that, if they were adduced, it would be disgraceful; and that he, therefore, maintained a passive part. It is very vague and quite inconclusive, as to any guilty act on *Atchama's* part, by which, under the law, she could forfeit any of her privileges. Neither does *Atchama's* conduct indicate a guilty part: she confidently brings her complaint, and lays herself open to any implication or charge that *Jaganadha* might urge in justification of his conduct towards her. *Jaganadha* is, on this complaint, fined and exposed; but *Atchama* does not stop here: she institutes a suit in the *Zillah* Court for maintenance, and obtains a decree in her favour in the lower and higher Courts: this does not mark that she had been guilty of any previous want of allegiance. However, having submitted to these ordeals, as it were, *Atchama* must be considered as holding all her privileges unimpaired, although *Jaganadha* thought fit to withhold them. The main cause of this disunion was, no doubt, a rivalship between the wives; and the ambition of *Rungama*, she being the younger of the two, about two years, naturally gained the ascendancy in the affection of *Jaganadha*, and having done so, it is not difficult to understand that these disputes would follow.

"If the adoption had been satisfactorily proved, unattended with the several objections and suspicions hanging over it, I should make a stand against its legality, on the ground of the law having been departed from, in performing it without the co-operation of the elder wife. The Government have pledged themselves to administer to Hindoos, the Hindoo law; and with that pledge before me, I cannot ratify, by my assent, an act done contrary to that law. I think it

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behoves every public officer in authority, to enforce a strict observance of the law, and not to allow caprice, anger, or any other passion, to step in, to cut off the rights of another. *Atchama* had an indisputable right to have aided at this adoption, as the first wife. The Plaintiff's witnesses admit that *Jaganadha* had no power to set aside the same, and deprive her of her legal rights. *Jaganadha*, during his life, never impeached her fidelity, although he had opportunity and provocation enough to do so, had there been grounds. None of the witnesses venture to do it. The plea that being married at the same moment of time, and that, therefore, there was no precedency, is absurd; it is quite out of the order of things to be so. The law says, that a man's wife is the half of himself, and that his second wife is for the gratification of his sensuality. How can two wives be the half of the husband? This is a futile attempt, as I view it, to evade the law. The question at issue is of too much importance to admit of a quibble in the scale. The Hindoo law admits of a plurality of wives, and at the same time assigns to them their proper station, duties, and privileges; it allows childless persons to adopt a son, for a special and spiritual purpose; and it equally prescribes the forms for it, and everything that is essential to its completion. If an adoption, therefore, takes place, omitting or evading those provisions, it is not according to the law, and, therefore, of no effect.

"*Jaganadha* could not plead ignorance of the law; he was surrounded by *Pundits*. He would appear, as is alleged, to have had recourse to them on a doubt of minor consideration. It is not reconcileable with that precaution, that he should have deviated from this point of law; it is equally irreconcileable that he

should have omitted another point laid down, that he should make known the adoption to the highest authority, not as a necessary act, but that publicity may be given to it, and the adoption recognised. The kindred and relations are also required to be present, but it is not found that any of his own kindred were at the ceremony. If *Jaganadha* had really gone through the ceremony, and adopted this boy, he would have followed the example of *Vencatadry*, who attended to all the provisions of the law, by which *Jaganadha's* succession was secured to him. I am of opinion the Plaintiff's case should be dismissed, with costs."

Mr. *S. Money*, the Third Judge, concurred with the First Judge; and the Court came to a finding upon the evidence, that no valid adoption of *Lutchmeputty* had ever taken place, and they dismissed the suit, with costs.

Against this decree, *Rungama* appealed to the *Sudder Dewanny Adawlut* of *Madras*, and as the Appeal from the first decree of the Provincial Court, in the original cause, had continued on the file of the *Sudder* Court, she filed a supplemental petition of appeal, against the second decree.

On the presentation of this Appeal, the course pursued by the *Sudder* Court, agreeably to their previous resolution, was, to bring under consideration at the same time the record of the three Appeals, viz. *Ramanadha's* original suit against *Jaganadha*; *Atchama's* suit against *Ramanadha*; and *Rungama's* suit against *Atchama*, *Ramanadha*, and *Puttoory Caly Doss*, on account of the intimate connection subsisting between them; and to pronounce one common decree in the three Appeals.

The decree was pronounced on the 14th of *March*

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1832. It reversed the decrees against *Ramanadha*, in his suit against *Jaganadha*, and *Atchama's* suit against him, and affirmed the decree in *Rungama's* suit, and declared *Ramanadha* entitled to the succession of the entire *Vassareddy* property, subject to certain allowances, for maintenance, to the widows of *Jaganadha*. The material part of this decree was in the following terms :—

"The question to be determined in these Appeals, is the right of succession to the entire property of the late *Vencatadry*. It is claimed, first, by *Ramanadha*, his second adopted son; secondly, by *Atchama*, the senior widow of the late *Jaganadha*, who was his first adopted son; and thirdly, by *Rungama*, the younger widow of *Jaganadha*, on behalf of his alleged adopted son, *Lutchmeputty*.

"It is plain that *Lutchmeputty's* adoption, if established, goes to defeat, *in toto*, the claim of *Atchama*, and so much of *Ramanadha's* claim as relates to one moiety of the estate. It appears, therefore, proper that a decision should first be passed upon the claim, which forms the subject of the Appeal, in the suit instituted by *Rungama* against *Atchama*, *Ramanadha*, and *Puttoory Caly Doss*.

"The Provincial Court, in a decree of extraordinary length, have gone into a recapitulation and detailed examination of the evidence, for and against the fact of the alleged adoption of *Lutchmeputty*, by the late *Jaganadha*, upon which the whole of this part of the case depends.

"Numerous witnesses are produced on the side of the Plaintiff, who depose that they were present during the performance of the ceremony of adoption at *Amaravaty*, which they detail with much minuteness, and

almost perfect conformity, as to the particulars of the ceremonial; and, on the other hand, the Defendants bring forward witnesses, who swear that they were present at *Amaravaty*, on the day assigned to the transaction, and that nothing of the kind took place.

"The Court is not disposed to attach much weight to the native testimony on either side. The facility with which false evidence is procurable in this country, and to an extent peculiarly notorious in that part of it to which those witnesses belong, is unhappily too well established by the records of the Court, to allow of admitting, under the circumstances which mark the present case, any fact as proved, merely from the number and consistency of the witnesses who depose to it. In determining on which side the preference should, in this case, be given, reference must be had to such other evidence as the record affords, and to the probability of the transaction attempted to be proved by the Plaintiff.

"It is averred in the petition of plaint, that, on the 14th of *July* 1819, information was given to the Collector of *Guntoor*, of the selection of the boy, *Lutchmeputty*, for adoption; and that, upon the occurrence of the ceremonial of adoption, on the 18th of *August* 1819, all the public authorities were made acquainted with the circumstance.

"But these assertions are contradicted by the depositions of Mr. *Oakes*, who was Collector of *Guntoor*, from the 24th of *July* 1811 to the 14th of *September* 1821; and Mr. *Russell*, who was Collector of *Masulipatam*, from the early part of 1812, to the middle of 1821.

"Mr. *Roberts*, who was afterwards Collector of the district, last mentioned, states indeed, in his deposi-

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tion, that in interviews which took place between himself and the late *Jaganadha*, from *April* 1824 until his decease, in *February* 1825, he was led to believe that the boy, *Lutchmeputty*, who accompanied the *Raja*, was his adopted son. On the other hand, Mr. *Whish*, the Collector of *Guntoor*, in a letter addressed to the Board of Revenue, dated the 26th of *July* 1826, states that the boy, *Lutchmeputty*, did accompany the *Zemindar* one day, on a visit to him; 'but it did not appear that he looked on him as his adopted son, although questions and answers passed, as to who he was.'

"In the decree of the Provincial Court, are contained remarks by the First Judge, upon Mr. *Roberts's* evidence, which appear to the *Sudder* Court to be extremely pertinent and forcible; and the Court are of opinion, that this officer, in his deposition, and in his communications to the Board of Revenue, lay under a misconception of what had passed in conversations with *Jaganadha*, in a language vernacular to neither party.

"It is well known that publicity, if not absolutely essential to the validity of an adoption by a Hindoo, is always sought on such occasions; and the record of the appeal, brought by *Ramanadha* against *Jaganadha*, shows with what care and pertinacity the late *Vencatadry* made known to the public authorities his adoption of *Jaganadha* and *Ramanadha*.

"So far from its being pretended by the Plaintiff, that any secrecy was observed on the occasion of the alleged adoption of *Lutchmeputty*, the whole of her evidence goes to show, that it was performed in the most public manner, and must have been immediately known to a large number of persons. Her assertion

that it was reported to the Collectors, has been already noticed: they, however, have denied that any such communication was made to them, and state that *Jaganadha's* adoption of a son was never brought to their knowledge.

"The only other material evidence, adduced in proof of the fact of the adoption of the boy, *Lutchmeputty*, is the alleged Will of the late *Jaganadha* in his favour. Could the authenticity of this document be admitted, it would certainly furnish strong evidence of the fact. But in respect to this Will, and the other two Wills, produced as having been executed by the same individual, in favour of *Atchama*, and of *Ramanadha*, respectively, it is to be observed, that, with reference to their dates, two of the three must be forgeries; and that if there were no other objection to this Will, the condition of *Jaganadha*, at the period of its alleged execution, is shown, by the evidence of witnesses for both parties, to have been such as to deprive it of all legal validity.

"The Court is of opinion, that had this adoption taken place, it could not, for a period of more than four years, have continued unknown to the revenue authorities: it considers also that the conduct of the Appellant, *Rungama*, subsequently to the death of her husband, and during the period which intervened between that event, and the date of the filing of the suit in 1826, is of itself sufficient to attach to the alleged fact of adoption, a high degree of improbability, which is enhanced by the circumstance of *Lutchmeputty's* being of a different *gotrum*; and after the most mature consideration, concurring in opinion with the Provincial Court, that the Plaintiff has entirely failed in making out her claim on behalf of *Lutchme-*

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putty, this Court resolves to dismiss the Appeal, with costs, against the Appellant, *Rungama*.

"The Provincial Court, in their decree in the suit of 1820, declare, and the opinion has the entire concurrence of this Court, that the adoption of both *Jaganadha* and *Ramanadha*, by the late *Vencatadry*, has been fully established; and the Provincial Court dismissed the claim of *Ramanadha*, solely upon the ground, that his adoptive father had, by the terms of the deed, disqualified himself from alienating any part of his property to the prejudice of the Defendant, *Jaganadha*.

"This Court can discover no ground for this decision. It cannot be supposed that such a deed could affect the rights of any son who might subsequently have been born to *Vencatadry*; nor has any argument been adduced to show it could preclude him from making a second adoption, in conjunction with his second wife, whom he espoused after the execution of that deed.

"In respect to the validity of a second adoption, under the Hindoo law, a son first adopted being alive, this Court is aware that much difference of opinion has prevailed. On the present occasion, the *Pundits* of the Provincial Courts, in the Northern, Centre, and Southern Divisions, are unanimously in favour of its validity; and an opinion to the same effect has, with one exception, been delivered by the *Pundits*, of the *Sudder Adawlut*, as appears from the following questions, put by the Court, to their late and present Hindoo law-officers, and their answers thereto:—

"'*Question.*—You are required to state whether a second adoption, (a son previously adopted being alive,

and not disqualified by degradation, or any other cause which excludes from inheritance,) is good and valid according to the authorities of Hindoo law, prevalent in the provinces subject to the *Madras* Presidency.'

" ' Answer of the *Pundit, Sivarama Sastri.*—While one adopted son is alive, and not disqualified by degradation, or any other cause which excludes from inheritance, a second adoption is not valid, according to the authorities of the Hindoo law, prevalent in the provinces subject to the *Madras* Presidency.

" ' *Authority.*—Text of *Menu* and others, in the *Vijnyaneswara, Smriti Chandrika*, &c., law-books, declare that a man who is in want of children, must use his endeavours to adopt a son, in order to succeed him, and to perform the obsequies of himself and his ancestors; and that no man should give a son to a person who has sons, because he has not that want, but should give sons to him who has none. But it is nowhere stated, in any law-book, that a second adoption can be made while an adopted son is alive.

" ' In the law-book, *Dattaka Chandrika*, which treats specially on adoption, the text of *Menu*, and its commentary, also state that a son must be adopted on the failure of a son of the body. A man who has a grandson or great grandson, but whose son is dead, is sonless; yet as a question may arise if he needlessly adopts a son, this text is intended to prohibit a man from adopting a son who has either a son, a grandson, or a great grandson, alive.

" ' In the law-books, *Nanda Pandita, Dattaka Mimamsa*, the texts of *Atri, Saunaka*, and *Menu*, and their commentaries, show that a man who has no son, or whose son is dead, may adopt a son; but not he who has sons.

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" 'In the same law-book, an objection is stated, that a man who has sons, may adopt a son, as *Viswamitra* and others did adopt *Devatratadaloo*. This act, however, as contrary to the *Smritis*, is prohibited; yet it is stated, that if there be a vast desire to do it according to the *Smritis*, on the consent of the son of the body, the power of adoption should remain, but there is no mention, while one adopted son is alive, of a second adoption.

" '*Viswamitra*, and those like him, were ancient sages, and celebrated by long and various penances, capable of doing both authorised and unauthorised acts. But men of the present age cannot follow their example. It is thus declared in the *sastras*.

" 'In the *Saraswati Vilasum*, it is declared that sons adopted while one son only of the body is alive, are debarred from inheritance, and should be merely maintained with supplies of food and apparel, and that the son of the body alone is entitled to the inheritance. *Marichi* made a commentary on the words, "one son only of the body," but he does not declare that a second adoption is valid.

" 'By *Lohita Mula Smriti* it is understood, that an adoption may be made once, not twice; that a second adoption cannot be made, even after the death of one previously adopted, and that only one, not two, three or four sons, may be adopted.

" 'The original *Smriti* of *Capila* declares, that on failure of a son's or a daughter's offspring, or on the death of a son or daughter, a son may be adopted according to the *Vedas*; that no adoption can take place while a grandson, or great grandson, or daughter's son, is alive; and that no second adoption can be made even after the death of one previously adopted; and that

as only one adoption is allowed by the *sastras*, a second adoption is altogether inadmissible.

"'The form of adoption is thus explained by *Saunaka*, in the law book of *Çamalankara Buttiya*, *Dattaka Mimamsa*:—The adopter must perform the ceremony of *datta homam*, or oblation to fire, and address the giver in these words,—"I am in want of a son; I request you to give me your son for my happiness." The giver must, by pouring water, then say, "As you are childless, I give you my son to raise up a progeny; and he is no longer my son."

"'It is declared in all *sastras*, that a son of the body is the principal, and that an adopted son is *gonna*; consequently it is highly improper that after the adoption of such a *gonna*, another *gonna* should be adopted, in the second instance. There is, therefore, no such rule or *sastrum* in any of the law-books.

"'In the law-books *Jaganathiyam*, *Saraswati Vilasum*, and *Vytheanada Dishatiyam*, (a book of authority on *Sradhas*,) or other authorities of law, prevalent in this part of the country, it is nowhere declared that a second adoption may be made, while one adopted son is alive. In the books I have seen, I found not a single text regarding second adoption. Hence the second adoption, mentioned in the question, is not valid under the authorities of Hindoo law, prevalent in the provinces subject to the *Madras* Presidency.

"'In Chapter IV., "on adopted sons," in the *Dayabhaga*, in *Jagannatha Tercapanchananum*, it is clearly declared, that a person desirous of many sons may adopt a son, while a son of the body is alive. But even *Jagannatha* does not declare that a second adoption may be made while a son previously adopted is alive.

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" ' *Veda Pattabhi Rama Sastri*, while he was in the college, compiled a book regarding adoption, after a deliberate consideration of all law-books. In this book *Pattabhi Rama Sastri* set aside the opinion of *Jagannatha*, which authorises an adoption while a son of the body is alive, and recited in support of his objection the text of *Menu*, which declares that an adoption by a man who has sons is forbidden, as the act of a man who plucks out his eye with his own hand.

" ' If there had been a rule or precept in the *Dharma Sastras*, authorising a second adoption, while one adopted son is alive, *Pattabhi Rama Sastri* would not have stated as aforesaid. I, therefore, write this for your information.'

" Answer of the *Pundit, Jyah Sastri*.—' While a son previously adopted is alive, and not disqualified by degradation, or any other cause which excludes from inheritance, a second adoption is valid, according to the authorities of the Hindoo law, prevalent in the provinces subject to the *Madras* Presidency, as will appear from the following texts :—

" ' Texts in the law-books, *Parasara Madhaviyam*, *Vitheanada Dishattyam*, *Ku'rma Puranam*, and others, and the text of *Vrihaspati*, and also the text of *Sanca Lichita*. A householder (*grahasta*) must procure many sons for the purpose of performing good acts, such as pilgrimage to *Gaya*, and other ceremonies, so that he and his ancestor may obtain bliss.

" ' A *vakyam* or phrase in the above said *Parasara Madhaviyam*, and the texts in *Maha Bharatha*.—A man who has only one eye is like one without eyes; and a man with only one son is like a man who is sonless. Thus it is said by persons acquainted with *vedas* and *sastras*. Hence the existence of an only son is

not a matter of consideration, and many sons should be obtained.

"'Text in the law-books, *Smriti Chandrika, Dattaka Mimamsa, Dattaka Chandrika*, and others.—In the *Cali Yuga*, or in this age, the son of the body and the son adopted have been principally recognised. Therefore, many sons may be adopted, in the same manner as many sons of the body may be obtained.

"'Texts in the *Nanda Pandita, Dattaka Mimamsa*, &c., law-books.—"A childless man should adopt a son." According to a text in the *Maha Bharatha*, "A man who has only one son is considered as a childless man." By the texts, therefore, when it is said that a childless man may adopt, is clearly meant, that either a man who has an only son, or no son, should adopt one.

"' By the *vedas*, as well as the *sastras* and *pooranas*, it is known that *Viswamitra Maha Rishi* and others adopted sons, while they had many sons of the body. In the said law-books, *Nanda Pandita* and *Dattaka Mimamsa*, it is declared, that a man who has sons of the body, may adopt a son with the *anoomity*, or consent, of the son of the body.

"' By the texts in the *Dattaka Chandrika, anoomity* implies what is not expressly opposed to the power of adoption. A man who has many sons of the body may adopt a son with their consent; but a man who has only one son, being considered as childless, may exercise discretion in adopting a son, without requiring the consent of his only son.

"' A *vakyam* of *Marichi* in the *Daya-bhaga*, in the law-book of *Saraswati Vilasum*, clearly declares that a man who has an only son ought to adopt a son.

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"'In the above books it is declared, that a son may be adopted while a son of the body (who has preference to an adopted son) is alive. It may, therefore, be undoubtedly inferred from the *sastras*, that a second adoption may be made while another adopted son (who has no preference) is alive.

"'Texts in *Dattaka Mimamsa*, *Dattaka Chandrika*, &c., law-books, as well as the text of *Catyayana*, and *vakyam* in *Smriti Chandrika*.—An adopted son loses the right of filiation, as well as all right to the property of his natural father, by his act of giving him up, and gains those of his adoptive father, by his act of taking him. After the performance of the prescribed ceremonies, according to the foregoing *sastras*, a second adoption is as valid as the first.

"'The said text of *Catyayana* declares, that as the right of a wife shall be recognised by marriage, so shall the right of an adopted son be by the act of giving and taking, and performing other ceremonies; therefore, the second adoption made (while one adopted son is alive, without fault) is valid, in the same manner as the second marriage, made with the desire of getting more sons, while the first wife conducts herself properly, and is mother of sons.

"'By the above-said, and other authorities of Hindoo law prevalent in the provinces subject to the *Madras* Presidency, it is declared, that the benefit of adopting a son is two-fold: first, to relieve a father from the debt due to ancestors, so that he may be relieved from hell; secondly, to raise up a progeny for the performance of good acts for the attainment of bliss. A person adopting only one son will attain the first benefit, while one adopting many will attain both the

first and second benefit. This is the fixed rule of *Dharma Sastras.*

" ' Under these grounds the second adoption, mentioned in the question, is good and valid, according to the authorities of Hindoo law, prevalent in the provinces subject to the *Madras* Presidency.'

" ' *Question.*—You are required to state, whether a person of the *Soodra* tribe, having adopted a son, and that son being alive, and not disqualified by degradation or any other cause, is competent to make a second adoption ; and whether the son so adopted has equal rights with the son first adopted.' To this the *Pundits, Jyah Sastri* and *Vadapoory Vajapeya Yajier*, returned the following answer :—' A person of the *Soodra* tribe, having adopted a son, and that son being alive, and not disqualified by degradation or any other cause, is competent to make a second adoption, for the purpose of propagating the family, and for the purpose of obtaining salvation, both for himself and for his ancestors, by travelling to *Gaya* and performing good acts ; and the son so adopted has equal rights with the son first adopted.

" ' *Authority.*—In the law-book, *Parasara Madhaviyam*, and in the commentary of *Vijnyaneswara*, &c., the text in *Lohita Smriti* and *Kurma Puranam*, many sons are to be desired, that some one of them may travel to *Gaya* and perform ceremonies. In the law-book, *Saraswati Vilasum* : The phrase of *Marichi*—A man who has only one son may adopt a son. In the commentary of *Vijnyaneswara* : The phrase of *Balam Bhatta*—Other sons may be adopted, although an only son of the body, or only one adopted son, be living ; that is, as many sons as may be requisite for the purpose of completing the ceremonies prescribed by *sastras.*

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In the law-book, *Dattaka Chandrika*, and in the commentary of *Vijnyaneswara*, &c.: The text of *Menu*— If a man has many *gonna putras*, or adopted sons, they have equal rights to his property.'

"And the Court having called upon the *Pundits* for a more full explication of the grounds on which their opinion was founded, they delivered the following answer:—

"'In clauses nine and ten, section i., of *Dattaka Chandrika*, of *Devanda Bhatta*, "Of the substitute sons of eleven descriptions, the son given only is recognised as admissible in *kali* age for adoption." Hence it follows, that the peculiar object of the author in this treatise, is to treat upon the subject of adoption, of a son given alone, as therein mentioned;' (the rules relative to the adopted son are now propounded;) 'although in the course of commenting upon the subject, the ordinary rules relating to the other descriptions of substitute sons unavoidably creep into it, by quoting the text of authorities.

"'In clauses eight and nine, section v., of *Dattaka Chandrika*, which treats of the adoption of given son alone, as above intended, it is ordained, *Menu*, "If there be many equal, in respect of virtue or quality, (i. e. coming immediately under any one of the said eleven descriptions,) let them participate equally the estate."

"'Thus, for instance, if a person had many legitimate sons, or many sons given, or many sons of the soil, or those of the other descriptions, they are to participate in equal shares. As it is not here the peculiar object of the author to enact any provisions to regulate the extent of shares to which substituted sons of any other descriptions than that of given sons would

be entitled, it is therefore deducible, that the true intention and meaning of the author, by quoting the passage in question, of *Menu*, the original founder of law, was certainly to regulate the shares of many given sons of a person. Had the adoption of more than one given son been, in the opinion of the author of *Dattaka Chandrika*, inadmissible, he could not have quoted the passage of the famous *Menu*, and the original text itself of *Menu* could not in that case be considered in any wise useful.

" ' As an equal participation of estate, by many sons given, is regulated above, and as the author of *Dattaka Chandrika* had not, in any passage of the work, forbidden the adoption of a second son given, and as he had not contradicted the opinions of the codes *Vijnyaneswara*, *Vyakyana*, *Saraswati Vilasum*, &c., which are, by general acceptance, declared as works of paramount authority in *South India*, and which sanction the adoption of many sons given, it is clearly evident, that the practice of adoption of given sons more than one is recognised by the author.

" ' The meaning of the clauses three, four, five, six, and thirteen, section i., of the treatise, *Dattaka Chandrika*, and the clauses three, four, five, six, seven, nine, ten, and eleven, section i., of *Dattaka Mimamsa*, which enjoin that " *aputra*," (described in clause four, section i., both of *Dattaka Mimamsa* and *Dattaka Chandrika*, one to whom no son may have been born, or whose son may have died,) only should adopt a son, is, according to the true intention of the author, and the true principles of law, to be defined to be a person destitute of a legitimate son, who only intends to adopt a given son. But this passage could not be justly considered as a prohibition against a person already in

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possession of a legitimate issue, wishing to adopt a given son. This point is very clearly treated upon, and decidedly established, in the chapter of adoption of *Vijnyaneswara*, *Vyakyana*, &c.

" ' It is expressly ordained in the laws, that the adoption is sanctioned for two peculiar purposes: the one for the sake of funeral cake, water, and solemn rites, and the other for the sake of multiplying his progeny, and obtaining the performance of *Gya-v-arjana*, &c. In clause three, section i., of both *Dattaka Mimamsa* and *Dattaka Chandrika*, it is inculcated, that when the adopter is destitute of a legitimate son, and wishing for attainment of the funeral cake and water, and solemn rites only, he should adopt a given son; but the passage does not in any way prohibit one that is anxious of multiplying his progeny, against his adopting given sons more than one. In the codes *Vijnyaneswara*, *Vyakyana*, &c., it is decidedly ordained, that a person wishing to multiply his progeny shall be at liberty to adopt many sons given. For these reasons, it appears by the clauses eight and nine, section v., of *Dattaka Chandrika*, that the author of it is likewise of the same opinion, that a person wishing to multiply his progeny may be at liberty to adopt many sons given, because he had therein expressly regulated the shares for many given sons adopted, without stating any arguments to refute it.

" ' If it is doubted to have been otherwise, it will not then only prove such part of his statement, in clauses eight and nine, as relate to the shares of many given sons, to be entirely useless, but will also produce a material contradiction to the original text of the eminent *Menu*, and other paramount authorities; for it is a fixed, standing, undeviable rule of the law, according

to the authority of *Vrihaspati*, that any passages which may appear contrary to those of the original founder, *Menu*, are undoubtedly inadmissible.

"'In clause eight, section iv., of *Nanda Pandita, Dattaka Mimamsa*, it is stated, by *Sa'ntanu*, "He who has only one son, is considered by me, destitute of male issue;" and also in clause twelve, section i., of the same treatise, it is indicated, that a man possessed of male issue may adopt another son, with the consent of such issue. In clause eight, section i., and clause twenty, section iv., it is declared, that "the giver of a son, to one who has issue, commits a sin; this prohibition regards the giver only." From this it clearly shows, that the person who adopts a given son, having already his own issue, is not forbidden. This position is decidedly established in the treatise entitled *Sri Rama Pandita, Dattaka Mimamsa*, and *Dattaka Cowstabham*, &c., treatises which are confined to adoption only, and held in estimation in *South India*.

"'In *Dattaka Mimamsa* of *Nanda Pandita, Sri Rama Pandita, Dattaka Mimamsa*, &c., it is declared, that the person who gives his son in adoption to another, who has a legitimate son of his own in existence, commits a sin. This prohibition is justly restricted and applicable to a person who gives his own son in adoption to another possessing a legitimate son only; but the person who gives his own son in adoption unto another, already possessing a son given, does not commit sin, for the following reasons:—It is declared in clause three, section vi., and in clause six, section v., that if a person adopts a son given while his own legitimate son exists, the legitimate son succeeds to the paternal property, to the utter exclusion of the son given, subjecting himself to the affording of the maintenance to

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the latter; and in this case, the son given will not only be deprived of participation of property of his natural father, but will also be excluded from any share of the property of his adoptive father: the natural father therefore commits a sin. For this very reason, in order to provide a share for such adopted son, the person who possesses a legitimate son, and wishing to adopt a given son, is required to obtain the consent of his legitimate issue, as ordained in clause twelve, section i., of *Dattaka Mimamsa*.

"'But if a person gives his son in adoption to another, who already possesses a given son, both of the given sons are entitled to equal participation of the property of their adoptive father, as specified in clauses eight and nine, section iv., of *Dattaka Chandrika*; and the person who gives his son in adoption does not in this case commit any sin at all.

"'It is, therefore, admissible, that the author of the *Dattaka Mimamsa* also has concurred with the foregoing opinion, that one who wishes his progeny multiplied, may adopt a given son, although he has already been in possession of one of the same kind.

"'Whilst in clause twelve, section i., it is provided that a person having a legitimate son may adopt also a given son with his consent, it is clearly evident that a person already having an adopted son may adopt another given son. This opinion is supported by various eminent authorities.

"'As *Dattaka Chandrika* is a concise treatise, points have not been treated upon in full length; and *Dattaka Mimamsa*, notwithstanding its conciseness, abounds with inconsistencies, in some points, and in others the statement is quite obscure and erroneous. This inference may be justified on reference to the preface of the printed English translation of the treatises; many

points contained in these treatises having been clearly argued upon, some rejected, and others modified and better construed, by the famous *Balam Bhattiya* and *Vijnyaneswara Vyakyana*, &c., of paramount authority. Besides this, there are many other similar treatises, exclusively on adoption, namely, *Sri Rama Pandita*, *Dattaka Mimamsa*, *Madhaviyam*, *Dattaka Ratnacara*, *Dattaka Cowstabham*, &c., of equal estimation; and therefore in expounding the meaning of *Dattaka Chandrika*, it is absolutely necessary that all these treatises, as well as the original codes in high estimation, such as *Menu*, *Smriti*, *Vijnyaneswara*, its commentary, *Balam Bhattiya*, *Varadarajeyem*, *Saraswati Vilasum*, *Madhaviyam*, &c., should be invariably referred to, before determining to form an opinion; but a mere reference to *Dattaka Chandrika* and *Dattaka Mimamsa*, alone, could not be sufficient, for the various reasons above stated.

" ' It is hoped that, upon a mature deliberation of the particulars stated in this memorandum, the answer formerly given to the question referred to us, on the occasion, will be found faithfully correct, and justly founded upon the true principles of law.'

" The Court observes, that the same doctrine is maintained in the case of *Gooreepershaud Rai* v. *Mussummaut Jymala* (2 Ben. Sud. Dew. Rep., 136); and no decision or text of Hindoo law, of acknowledged authority, has been brought to their notice, which declares such a second adoption to be invalid.

" The Court have, therefore, no hesitation in deciding in favour of the claim of *Ramanadha*, to all such rights as devolve upon him, under the circumstances of this case, as son of the late *Vencatadry*, thereby setting aside the decree of the Provincial Court.

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"This decision conveys, according to the Hindoo law, to *Ramanadha*, the right of succession to a moiety of the estate, real and personal, of his adoptive father; and with the view of ascertaining the rights of the parties, respectively, to succeed to the property of the first adopted son, *Jaganadha*, constituting the other moiety of that estate, the Court put the following questions to their Hindoo law-officers:—

"'A., a *Zemindar* of the fourth class, had two sons, B. and C.; some years before his death, he executed an instrument in writing, declaring each of his sons entitled to a moiety of his property, moveable and immoveable; he also put them respectively in possession of their shares of his landed estate; but the payment of the public revenue, on the whole *Zemindary*, continued during A.'s life to be made by him; and other acts of ownership, such as granting leases, in like manner were performed by A. up to the period of his decease, at which time he executed, in writing, another instrument, confirming the equal distribution of his real and personal estates between B. and C.; no division of the personal property was, however, actually made at that time; and shortly after A.'s death, B., the eldest son, took possession of the whole of it, and of a portion of the lands which had been allotted to C., who thereupon instituted a suit to recover his moiety of the real and personal property; but before the suit was finally decided, B. died, leaving two widows without issue.

"'You are required to state—Whether, under the foregoing circumstances, C. is entitled to succeed as heir to B., in preference to the widows of B., according to the Hindoo law, as prevalent in the *Madras* territories.'

"To this question the *Pundits* have returned the following answer: —

"'In the *Dharma Sastras* are declared two periods of partition, *Jivad Vibhaga*, or partition during the lifetime of the father, and *Ajivad Vibhaga*, or partition after the death of the father. *Jivad Vibhaga* is the partition made between the father and sons, during the lifetime of the father, according to the text of *Yajnyawalcya*, in clauses first and second, section ii., Chapter I., in the *Mitacshara*, *Daya-bhaga*, and according to the text of *Catyayana*, in the chapter on *Jivad Vibhaga*, in the law-books *Smriti Chandrika*, &c.

"'If partition had so taken place between the father and sons, they would have severally gained a right and ownership in their respective shares, to dispose of the same by gift, or sale, or to pay and receive income and expenses, &c.; but they would not have a right or ownership in the shares of each other. Therefore each of them is competent to hold and enjoy, separately, the possession of his share, and can do all acts of ownership, such as granting leases, or receiving and paying income and expenses, without the consent of the other, or without intermixing his share with that of the other. If the father and sons have, as aforestated, made a partition between them, and managed their affairs separately, it could be concluded that *Jivad Vibhaga*, or partition during the lifetime of the father, had taken place.

"'Although A. the father, as mentioned in the question, had executed instruments in writing, and put each of his sons in possession of a moiety of his landed estate, yet it appears from the question, that he retained in his possession the whole of his personal estate, and continued, during his life, to perform all acts of owner-

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ship, such as granting leases, &c., appertaining to the whole *Zemindary*, which was already put in possession of his sons. As the said A. did not relinquish the right and ownership he had in his real and personal estate, but reserved the same to himself, it appears that the said instruments were executed by him, for the purpose of making known the manner in which his sons should make a division of his property after his death, and that no division was made by him during his life. Therefore it is conclusive that B. and C. lived as an undivided family, up to the period of A.'s decease.

"'As, after A.'s death, B. took possession of the whole estate, without dividing and giving property to C., agreeably to the instruments executed and left by his father, and as B. died before the suit instituted by C. to recover his share was finally decided, it is conclusive that B. and C. lived as an undivided family up to the period of B.'s decease.

"'Under the foregoing circumstances, and as B. and C. lived as undivided brothers when B. died, leaving two widows without issue, the said C. is entitled to succeed as heir to B. in preference to the widows of B., according to the *sastras* prevalent in the *Madras* territories.'

"It appears from the above exposition of the law, that, under the circumstances of this case, *Ramanadha* and *Jaganadha* are to be considered as undivided brothers; and no point of Hindoo law is more clear than that, according to the authorities prevalent on this side of *India*, the widow of an undivided brother has no right to her husband's property, which goes, in preference, to his brother.

"Adopting, therefore, the declaration of the law of the case, given by their law-officers, the Court,

reversing the decree of the Provincial Court, adjudge that the Appellant, *Ramanadha*, is entitled to succeed to the entire estate, real and personal, of the late *Vencatadry*; and, under the circumstances of the case, the Court directs that the parties in the Appeal should pay their own costs respectively.

"The widows of the late *Jaganadha*, being thus pronounced to be, by the Hindoo law, excluded from inheriting their late husband's property, the Court, with the view of preventing future litigation, resolve to adopt the precedent established in a similar case, by the decision of the *Sudder Dewanny Adawlut* in *Calcutta*, in *Mussummaut Bheeloo* v. *Phool Chund* (3 Ben. Sud. Dew. Rep., 223). In that case it was decided, that where the widow of a Hindoo is excluded by law from inheriting her husband's property, the Courts are authorized to fix the amount of maintenance receivable by her, from her husband's heirs, with reference to the circumstances of the family.

"And the Court, proceeding upon this principle, do further decree, that *Ramanadha*, and his heirs, shall pay to each of the widows of the late *Jaganadha*, *Atchama* and *Rungama*, the sum of R. 500 *per mensem*, as maintenance, during the term of their lives, respectively; such payments to be made with interest at the rate of one *per cent. per mensem*, from the 28th of *February* 1825, the date of the decease of the late *Jaganadha*, to this date, deducting therefrom such sums, with the same interest thereupon, as may have been paid since that date to *Atchama* and *Rungama* from the income of the estate."

From this decree, *Rungama* and *Atchama* respectively appealed to Her Majesty in Council. The Appeals now came on for hearing.

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Mr. *Kindersley*, Q.C., Mr. *Buller*, and Mr. *Jackson*, for *Rungama* and *Lutchmeputty*, Appellants in the first Appeal.

This is a case of great importance, not merely on account of the large property at stake, about £90,000 a-year, but also from the questions of Hindoo law, which are involved in it, and upon which much conflicting authority exists. The principal inquiries are: —*First*, To whom did the estate of *Vencatadry* descend; and, *Secondly*, Who is entitled to the succession of *Jaganadha*, his adopted son? The first question depends upon the formality of the adoption of *Ramanadha*, by *Vencatadry*; whether such adoption was performed according to the ceremonies required by the Hindoo law, and if so, whether he could be legally adopted, *Jaganadha*, the first adopted son of *Vencatadry*, being alive at the time.

I. With regard to the first point, it is contended by *Ramanadha*, that certain forms and ceremonies were observed and performed, which constitute a second adoption. The adoption of *Jaganadha* by *Vencatadry* is admitted on all hands to have been strictly formal and legal; and it appears from the evidence, that, about the year 1807, *Vencatadry* manifested some desire to adopt another son; it is also admitted, that *Ramanadha* was for several years, and during his infancy, maintained by *Vencatadry*, and treated by him as his son; but these circumstances, alone, will not establish a title to the share of the inheritance which *Ramanadha* claims. The testimony of the witnesses produced by him is neither conclusive or satisfactory, as to the performance of the formalities requisite for an adoption; but, even admitting such ceremonies to have been duly performed, we submit that, upon the prin-

ciples of the Hindoo law, in force at *Madras*, which must govern this question, that, during the lifetime of *Jaganadha*, the first adopted son, or his male issue, it was not competent to *Vencatadry* to make a second adoption, so as to constitute him a co-heir with the prior adopted son, and entitle him to share in the performance of the funeral rites and other religious ceremonies jointly with the first adopted son; the right to inherit being co-relevant with the right to perform such religious ceremonies. Though some doubts exist, from a conflict of authorities, upon the subject of a second adoption, the better opinion, and, as we maintain, the weight of authority, is against such an adoption. The opinion of the majority of the *Pundits*, taken in these suits, which the *Sudder Dewanny* Court adopted, were in favour of such second adoption, principally upon the ground, that neither the *Dattaka Mimamsa*, nor the *Dattaka Chandrika*, expressly forbid two successive adoptions, but that, on the contrary, from the provisions stated, with respect to a man with only one son of his body, it is to be inferred that, in such case, he might adopt another son; and that, as there is no real difference between a real and an adopted son, a man having an adopted son may adopt a second. These *Pundits* referred also to the *Vijnyaneswara*, *Vyakyana*, and the *Saraswati Vilasum*, in support of, and as explanatory of, the above texts. We submit, however, that these opinions are erroneous: they are founded upon a misconception of the passage in the *Dattaka Mimamsa*. That passage states, that "he who has only one son, is considered as destitute of male issue" (sec. iv., plac. 8); as well also of the passage in *Jagannatha* (3 *Colebrooke's* Dig., p. 290), that "many sons are to be desired, that some of them may travel

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to *Gaya*," which applies only to natural sons, and to the case of a man giving a son, not to taking a second adopted son, while the first is living. It can only mean, a successive adoption, to take effect, in the event of the failure of the existing issue. The opinions of the *Pundits* of the Court below are not conclusive, and must be received with great caution. 1 *Coleb.* Dig., p. vi.; they are taken, under *Madras* Reg. II. of 1802, to enable the Court to consider the reasons and authorities cited, so that, in that respect, this Court is in the same condition as the Court below. It appears that some writers of eminence have disagreed; *Jagannatha* (3 *Coleb.* Dig., 289, 295), for instance, inclines to hold a second adoption to be valid. The weight of authority is, however, opposed to a second adoption, while the first adopted son is living. *Vivadarnava Setu*, (Gentoo Code, by *Halhed*) ch. xxi., sec. ix. Ordinances of *Menu*, (by Sir *W. Jones*), ch. x., plac. 168. *Sutherland's* Synopsis. *Datt. Mim.*, sec. i., plac. 6. *Datt. Chan.*, sec. i., plac. 3. 2 *Strange's* Hindoo Law, 85. (2nd edit.) *Steele's* Law and Custom of the Hindoo Castes, 48. 52. 185. *F. Macnaghten's* Cons. on the Hindoo Law, 146. 2 *W. Macnaghten's* Principles of the Hindoo Law, 200. Note by *Colebrooke*, to the case of *Narainee Dibeh* v. *Hurkihor Rai* (*a*).—[Sir *E. East*: How was this by the Roman law, where adoption prevailed?]—By the Roman law, a man having a natural son could adopt another. The Emperor *Tiberius*, for instance, though he had a son, *Drusus*, adopted *Germanicus*. No case can be found where such second adoption has been held valid, by the Courts in *India*. In *Shamchunder and another* v. *Narayni Dibeh* (*b*), it was held, by the

(*a*) 1 Ben. Sud. Dew. Rep., 42.
(*b*) Ibid. 209.

Sudder Court at *Bengal*, that there might be two successive adoptions, under due authority given for that purpose, to the widows of the same man. But that was a case of successive adoption, the first adoption having failed before the second adoption took place; it is, therefore, essentially different to the present case. Again, in *Gooreepershaud Rai* v. *Mussummaut Jymala* (*a*), a childless Hindoo, having two wives, gave permission to each of them to adopt a son; after having himself adopted a son on behalf of the senior wife, he confirmed the permission originally given to his second wife. It was held by the *Sudder Dewanny* Court, at *Bengal*, that an adoption by her after her husband's death was valid. This case, however, when examined, does not support the validity of a second adoption: it is rather the effect of the second adoption by the husband, revoking the authority given to the wife to adopt. It has never been considered as decisive of the law on this subject. On the contrary, it is treated as a doubtful case. *F. Macnaghten's* Cons. on Hindoo Law, 182.

The principle of the Hindoo law, which is to be deduced from the majority of these authorities, appears to be this, that where a man has either a natural born son, or a legally adopted son, living, it is not competent to him to adopt another son, so as to constitute him, in any sense, an adopted son, other than that he may be a substituted son, to supply the place of the existing adopted son in case of the death of that son. Such adoption is invalid, for the purpose of constituting such second son a co-heir with the first adopted son. That such second adoption is also illegal, is manifest from the *status*, acquired by the first adopted son, by such act. According to the Hindoo Law, a person in whose behalf the ceremonies of adoption have been per-

(*a*) 2 Ben. Sud. Dew. Rep., 136.

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formed, can never claim to represent the family or inherit the estate of his natural parents. *Duttnaraen Sing* v. *Ajeet Sing* (*a*). 1 *Strange's* Hindoo Law, 101. (2nd edit.) 2 *Strange's* Hindoo Law, 129. (2nd edit.) *Datt. Mim.*, sec. vi., plac. 8.—[Sir *E. East*: An adopted son may be considered in the light of a purchaser for a valuable consideration, as he has thereby lost his inheritance. 2 *W. Macnaghten's* Principles of Hindoo Law, 183.]—Yes, and it is so treated as settled law. *Mitacshara*, ch. i., sec. xi., plac. 32. The title of *Jaganadha* to the inheritance of *Vencatadry* was not affected by this assumed second adoption. We submit that *Vencatadry* could not by any second adoption, or by any other act whatever, defeat the effect of the contract of adoption entered into between him and the natural parents of *Jaganadha*, in consideration of which, he was constituted son and sole heir of *Vencatadry*; and thereby cut off and deprived of all possibility of title of inheritance from his natural parents.

Much stress is laid on the assumption, that all due forms were used in the adoption of *Ramanadha*; but assuming such to have taken place, the adoption being invalid, it had no effect on the right of *Jaganadha*, as sole heir: the subsequent steps, by which it was attempted to confer upon *Ramanadha* a title to a portion of the property after the decease of *Vencatadry*, were absolutely nugatory and void. There was no recognition of *Ramanadha's* title, by *Jaganadha*, when he came of age. He can, therefore, claim nothing beyond such portions of property as *Vencatadry* had the power in law to dispose of, by an act, *inter vivos*, and absolutely conferred upon him during his lifetime.

II. In whom is the right of succession to *Jaganadha's* estate? This question is one of great nicety: the

(*a*) 1 Ben. Sud. Dew. Rep., 20.

claimants are *Ramanadha*, in his alleged character of second adopted son and undivided brother of *Jaganadha*; *Lutchmeputty*, the adopted son of *Jaganadha*; and *Atchama*, his senior widow, who claims the whole estate of *Vencatadry* and *Jaganadha*, her husband having died childless.

Assuming the second adoption of *Ramanadha* to be good, to constitute him co-heir with *Jaganadha*, the effect of the subsequent apportionment and division of the estate by *Vencatadry* completely severed their joint interest, and prevented the possibility of a mutual succession. This is the effect of the apportionment. *Ramanadha*, therefore, would only be entitled to such part of the property as he was put in possession of by *Vencatadry*. If *Jaganadha* and *Ramanadha* had been undivided brothers, at *Vencatadry's* death, *Jaganadha*, as eldest son, would in that event have inherited, subject to the right of his brother living in commensality with him. But the facts in the case show the contrary of this condition of things; the first act of *Ramanadha*, after *Vencatadry's* death, was to claim the share allotted to him by *Vencatadry*. *Jaganadha* and *Ramanadha* lived separately, and if brothers at all, according to the Hindoo law, were unquestionably divided brothers. The evidence in the case proves that; and at *Jaganadha's* death, the estate would descend either to his adopted son, or, failing him, to his widows, in preference to *Ramanadha*, who can have no claim. *Lutchmeputty* was the adopted son of *Jaganadha*, and as such he became entitled to succeed to *Vencatadry*, in preference to *Atchama*, the widow, who is only entitled to maintenance. The fact of the adoption of *Lutchmeputty* by *Jaganadha* is established by the evidence, and is supported by the necessity which

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exists for such an act. It was essential in the state of *Jaganadha's* family. He had no children either by *Atchama* (whom he had repudiated and lived apart from), or by *Rungama*, his favourite wife. The absence of natural issue, and the existence, as it is alleged, of physical causes, rendering it impossible that he could have issue, together with the consequences, incident, according to the Hindoo religion, to a man dying childless, render the presumption of such adoption almost conclusive. It is laid down in the *Dattaka Mimamsá*, sec. i., plac. 5, that heaven cannot be obtained by a person destitute of male issue: and again, that male issue deliver the soul of the parent from hell. *Daya-bhaga*, chap. xi., sec. i., plac. 31. *Steele's* Law and Custom of Castes, 48. These considerations would have induced *Jaganadha* to seek for a male infant to adopt; and accordingly there is abundant evidence, that, in conjunction with his wife *Rungama*, he did adopt *Lutchmeputty*, and duly performed the ceremonies on such occasion. He formally adopted him in 1819. It was not essential that he should communicate such fact to the Government authorities at the time of such adoption. *Alank Manjari* v. *Faker Chand Sarkar* (*a*). *Sutherland's* Synopsis, p. 218. Though notice of such an event is sometimes given, it is only to give publicity to the act. He afterwards introduced such son to the Collector, as his son. He was brought up at *Jaganadha's* house, as his son. The Respondents *Ramanadha* and *Atchama* endeavour, however, to avoid the consequence of the adoption of *Lutchmeputty*, it being destructive of the titles they have respectively set up. They deny that any ceremonies of adoption were ever actually performed; or, if they were, they

(*a*) 5 Ben. Sud. Dew. Rep., 356.

insist that they were ineffectual. *Atchama* objects to the validity of the adoption on two grounds: *first*, if the ceremonies were performed without her participation and concurrence, as the senior wife, they were of no effect; and *secondly*, that supposing her exclusion from the participation constituted no objection, yet that there being male children eligible for adoption in the *Vassareddy* family, *Jaganadha* could not legally adopt *Lutchmeputty*, as he was of a different *gotrum*, or family. *Ramanadha* also objects to its validity upon this last ground. Neither of these objections can prevail. In the first place, the adoption of a son being a duty enjoined by the Hindoo religion for the spiritual welfare of the childless man, there is no authority to be found in the Hindoo law which precludes him from making that adoption, without the consent or co-operation of his wife. Adoption is the act of the husband alone; the wife's assent is not requisite. 1 *Strange's* Hindoo Law, 78. (2nd edit.) 3 *Coleb.* Dig., 244. *Alank Manjari* v. *Faker Chand Sarkar* (*a*). The wife may, if required, join in the performance of the ceremonies of adoption, but the act is that of the husband alone. Here *Rungama* did join in the performance of the ceremonies: the assent or co-operation of *Atchama* was not required. The distinction between a first, or senior wife, and a second wife, is one of caste only, not of seniority. *Daya-bhaga*, ch. xi., sec. i., plac. 47. But here both the wives were of the *Soodra* caste, where no distinction prevails. In the circumstances of the case, it was impossible to have obtained the concurrence of *Atchama*, to the adoption. She was repudiated by her husband, and in a state of hostility to him. If she refused to consent, he would die childless. The Hindoo

(*a*) 5 Ben. Sud. Dew. Rep., 356.

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law seems to have anticipated this state of things, and provided for it by vesting the right absolutely in the husband. Neither can the other objection, assigned by *Ramanadha* and *Atchama*, that there were eligible objects of the *Vassareddy* family, which the law required *Jaganadha* to give a preference to in adopting, for avoiding the adoption, prevail. *Jaganadha* was a *Soodra*, and so was *Lutchmeputty*, and might, by the Hindoo law, be the object of adoption, without reference to *gotrum* or family. *Datt. Mim.*, sec. ii., plac. 18, 74. The only tenable claims are those of the widows to maintenance.—[Mr. *Pemberton Leigh*: If *Lutchmeputty's* title, as adopted son fails, do you fall upon *Jaganadha's* Will?]—Whether an Hindoo can make a Will, in the sense understood by an English testamentary disposition, is still a mooted point. In *Baboo Janokey Doss* v. *Bindabun Doss* (*a*), this Court, without deciding in favour of a Will, made by a Hindoo, domiciled at *Benares*, held that there were not the necessary parties, to enable the Court to make a decree. We do not rely upon the Will.—[Mr. *Pemberton Leigh*: Supposing *Lutchmeputty* out of the case, you then claim for *Rungama*?]—Yes, she and *Atchama*, as the two widows, would take as co-heiresses. The title of a widow of a deceased Hindoo, without issue, male or adopted, is only to a life estate. *Keerut Sing* v. *Koolahul Sing* (*b*), and the authorities there cited. *Mohun Lal Khan* v. *Ranee Siroomunnee* (*c*). The *Sudder* Court's decree, therefore, is altogether wrong, for they ought, if they rejected the claim of *Lutchmeputty*, to have admitted *Rungama* with *Atchama*, as the widows of *Jaganadha*, to

(*a*) 3 Moore's Ind. App. Cases, 175.
(*b*) 2 Moore's Ind. App. Cases, 331.
(*c*) 2 Ben. Sud. Dew. Rep., 32.

succeed equally to the property in question. *F. Macnaghten's* Cons. on Hindoo Law, 6.

Mr. *Wigram*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for *Atchama*, the Respondent in the first, and Appellant in the second, Appeal; and also for the Respondent, *Puttoory Caly Doss*.

I. To the extent of *Ramanadha's* claim to the succession, the interest of *Atchama* is concurrent with *Lutchmeputty*. *First*, The adoption of *Ramanadha* is not proved. We take the arguments used on behalf of the Appellant *Lutchmeputty*, and insist that such alleged adoption was insufficient and invalid. 2 *W. Macnaghten*, 200. *Secondly*, If the adoption of a second son, in the lifetime of a son previously adopted, could be valid by the Hindoo law, *Vencatadry*, by reason of the special contract, under which *Jaganadha* had been given to him in adoption, was incompetent to make such second adoption. The attempt to make a second adoption would be a fraudulent evasion of this contract, and, as such, void. No person, therefore, claiming through *Vencatadry*, could take advantage of such a violation of the original contract. By the adoption, *Jaganadha's status* became changed; he gave up the inheritance to his natural parents, and the rights which flow from that relation, and became, according to the Hindoo law, to all intents and purposes, the son of his adoptive father. How then can it be argued, that it is competent for *Vencatadry*, by a voluntary act, after having placed *Jaganadha* in that position, to defeat his own act, and the just claims and expectations of the adopted son? At all events, the second adopted son could acquire no right of inheritance, to the prejudice

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of the first. But even assuming these positions to be untenable, we submit that *Jaganadha* and *Ramanadha*, at the time of the death of the former, were not living as undivided brothers. They had separate possessions of lands and houses, *Mitacshara*, ch. ii., sec. xii., plac. 1, 2, and lived apart, which is a conclusive test of a divided Hindoo family. 1 *Strange's* Hindoo Law, 225, 227. (2nd edit.) A division of property having been made, that was all that the Hindoo law required, to make them divided brothers, so that no mutual right of inheritance could subsist between them. The opinion given by the *Pundits*, upon this point, was upon a misrepresentation of the true facts of the case. The *Sudder* Court, in putting the question to them, treated *Jaganadha* as having had the whole estate, and suppressed the fact, that the division was perfected by *Ramanadha* taking possession and managing his share of the property. Had the facts been correctly stated, the opinion of the *Pundits* must have been the other way, and the *Sudder* Court would have decided in favour of the division.—[Mr. *Pemberton Leigh*: A question arises, whether *Ramanadha's* adoption has not been confirmed by *Jaganadha's* acquiescing, after he came of age, in the partition made by his father,—whether such confirmation is not equivalent to previous assent?]—No implied acquiescence could make such adoption legal. The partition by *Vencatadry* was made on the presumption that *Ramanadha* was well adopted, as the second son, and so entitled to succeed, with the first son, to the estates of his father. The division between them was made under the erroneous supposition of their legal rights, as heirs of *Vencatadry*. It was not intended to create any new or independent right on *Rama-*

nadha's part. *Jaganadha* acquiesced in the division, to avoid his father's displeasure, for immediately after his death, he claimed the whole estate, as sole heir.

II. The alleged right of *Lutchmeputty* to succeed to *Jaganadha's* estate, is not well founded: the evidence proves that no such adoption, as he insists on, ever took place. The story of the adoption is altogether incredible: what satisfactory explanation can be offered for the long delay between *Jaganadha's* death and the starting of this claim?—[Lord *Langdale*: *Rungama* says she was a secluded woman, and deceived by *Ramanadha*.]—The *onus* of proof is on *Lutchmeputty*: he must prove that he was adopted. The evidence adduced in support of his adoption was considered, by both Courts in *India*, unworthy of credit. The greatest strictness in evidence is required to prove an adoption, in a Hindoo family. *Sootrugun Sutputty* v. *Sabitra Dye* (*a*). The conclusion of the Provincial Court, after a full and impartial investigation, was, that, under the circumstances, the presumption was against such adoption. It is impossible for any Court of Justice to say which is most conclusive, the testimony of the Plaintiff's or the Respondent's witnesses, or to admit Mr. *Roberts's* vague impressions to amount to proof. It was no more than his impression of a circumstance: it is no evidence of the fact. There are two concurring decisions in our favour, and the Appellant asks this Court to disturb these verdicts of the native Courts in *India*, made when the opportunity was afforded of personally seeing and cross-examining the witnesses. A Court of Common Law, in this country, would not grant a new trial, in such

(*a*) 2 Knapp's P. C. Cases, 287.

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circumstances; and this is the rule by which this Court has heretofore been governed: they will not question the accuracy of the finding of the Native Courts, upon a mere question of fact, unless there appears some clear distinct point, in which the Court was wrong; even though doubts may be entertained. *Baboo Ulruck Sing* v. *Beny Persad* (*a*). Such adoption would, however, if it had taken place, be invalid in law. *First.* It could not be made without *Atchama's* concurrence. It is laid down in the Hindoo law-books, that adoption should be in concert with the wife. It is admitted by *Rungama*, that *Atchama* did not assent to it, and that she only joined with *Jaganadha*, in the adoption. This was a fatal omission. It is said, however, that the concurrence of *Atchama* was impossible, for that she was absent from her husband, and at variance with him. This is no answer. Nothing short of actual infidelity would deprive her of her rights, as a wife. 1 *Strange's* Hindoo Law, 136. (2nd edit.) Then *Lutchmeputty* is taken from another *gotrum* or family; that also would render his adoption invalid: there were boys of the *Vassareddy* family, eligible to be taken in adoption, if required.

The claims of *Ramanadha* and *Lutchmeputty* being disposed of, *Atchama* became, according to the Hindoo law, and the custom prevailing in *Madras*, as the senior widow of *Jaganadha*, who died without issue, entitled to succeed to all his estate, both real and personal. She does not claim under the Will, made in her favour by *Jaganadha*.—[Mr. *Pemberton Leigh*: Does she take the estate absolutely, or for life only?] —She has only a life estate. *Keerut Sing* v. *Koolahul*

(*a*) 2 Knapp's P. C. Cases, 265.

Sing (*a*). *Rungama* being the junior widow, her claim to participate with *Atchama*, in the succession, is inadmissible. Her title, if any, would be to succeed at *Atchama's* death.

Lastly, The Respondent, *Puttoory Caly Doss*, was improperly made a party to the suit, and the Appeal ought to be dismissed, as against him, with costs. No relief was prayed against him, and the charges of confederacy and combination by him with *Ramanadha* were unsupported by evidence. The sole object of making him a Defendant was to shut out his testimony. In *Attwood* v. *Small* (*b*), the House of Lords held, that it was a point which strongly prejudiced the claim of the Plaintiff, because it shut out evidence which ought to have been placed before the Court.

Mr. *Stuart*, Q. C., Mr. *J. Parker*, Q.C., and Mr. *Goodeve*, for *Ramanadha*, Respondent in both Appeals.

We contend that *Ramanadha* is entitled to the succession of *Vencatadry* and *Jaganadha*. This claim is founded, *first*, as the second adopted son of *Vencatadry*; and, *secondly*, as undivided brother of *Jaganadha*. His interests are adverse to the claims of *Lutchmeputty*, and the two widows, *Atchama* and *Rungama*.

I. It cannot now be contended, as far as ceremonies constitute adoption, that this Respondent was not adopted by *Vencatadry*. His legal adoption was clearly proved in the suit, instituted by him against *Jaganadha*. But the other claimants say that, admitting that he was adopted, yet that a second adoption, in the lifetime of the first adopted son, was an illegal act,

(*a*) 2 Moore's Ind. App. Cases, 331.
(*b*) 6 Clk. & Fin. 233.

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and of no avail; and that, under the conditions contained in the deed executed by *Vencatadry* upon *Jaganadha's* adoption, he was absolutely precluded from adopting another son, inasmuch as it would prejudice the rights of *Jaganadha*. Neither of these objections can prevail. By the Hindoo law and custom prevailing in that part of *India* where the *Vassareddy* estates are situate, a second adoption, by the great *Zemindars*, is allowed. The opinion of the Hindoo law-officers, after a careful investigation, was decidedly in favour of the legality of such adoption, and their exposition of the law was received and acted on, by the *Sudder* Court. That Court came to the conclusion, that there was, *de facto*, an adoption, and that *Vencatadry* had power, *de jure*, to make a second adoption, though in the lifetime of his first adopted son. Both *Lutchmeputty* and *Atchama* admit, as a proposition, that *Vencatadry* might have adopted a second son; but they say that it could only be for the purpose of substitution, and not to make him a co-heir. It has, however, been decided by the Court, in *India*, in *Gooreepershaud Rai* v. *Mussummaut Jymala* (*a*), that a man, having adopted a son, in concurrence with one wife, could legally authorise another wife to adopt a second son. So in the case of *Shamchunder and another* v. *Narayni Dibeh* (*b*), a second adoption, in the lifetime of the first son, was upheld. This principle of law is recognised by writers of established authority: 1 *Strange's* Hindoo Law, 78. (2nd edit.) 2 *Strange's* Hindoo Law, 85. (2nd edit.) *Colebr.* Dig., 284, 295. As, therefore, the Hindoo law sanctioned such second adoption, there was nothing in the

(*a*) 2 Ben. Sud. Dew. Rep., 136. (*b*) 1 Ben. Sud. Dew. Rep., 209.

deed, executed by *Vencatadry*, which would incapacitate him from adopting *Ramanadha*. The restrictive words are, "I have it not in my power, on any account whatever, to make the property to any other person." This instrument has no reference to the right of *Vencatadry* to adopt another son. Now, the adoption of another son is not the making over the property to another. *Ramanadha*, as co-heir with *Jaganadha*, from the time of his adoption, had an inalienable and indefeasible right to the *Zemindary* property. This deed, in fact, is a mere voluntary settlement.—[Mr. *Pemberton Leigh*: Is it a settlement at all? Is it not a declaration of what he considered to be the effect of the adoption of *Jaganadha*?]—When he adopted the first son, and made the deed, he no doubt considered him as his heir; but it does not follow, but that there may be a co-heir afterwards. Suppose *Vencatadry*, subsequently, had a son born in wedlock, what would have been the effect of the deed? It would have been clearly inoperative.—[Sir *E. Ryan*: As to the ancestral estate, he had no power of disposing of it.] —In this case, there was acquired as well as ancestral property; and the acquired property, it cannot be disputed, he had power to alienate, in favour of *Ramanadha*. The opinions of the *Pundits* are conclusive, that among the Hindoos, in case of a plurality of natural offspring, all the sons possess a joint right of succession, which, on failure of an effectual division, devolves on the survivors, in the same manner as a joint tenancy in *England*. Adoption places the party on the same footing as the natural offspring of persons adopting. The legal effect of the adoption of *Ramanadha* was conferring on him, conjointly with *Jaganadha*, the right of succession to the whole pro-

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perty, ancestral as well as acquired, of *Vencatadry*, their adoptive father. In case, therefore, of the death of the first adopted son, in the other's lifetime, *Ramanadha*, as the survivor, would succeed to the entirety, being the representative both of his adoptive father, and also of his brother. The course pursued by *Jaganadha*, when he came of age, in acquiescing and recognising *Ramanadha's* adoption, make it fraudulent for him now to raise a claim inconsistent with his former conduct. He treated *Ramanadha* as his brother, and as such entitled to half the property.

II. *Jaganadha* and *Ramanadha* were undivided brothers, and upon the death of *Jaganadha*, without children, *Ramanadha* would take the whole estate, to the exclusion of *Atchama*. But independently of his title, by survivorship, *Ramanadha* was entitled to that portion of the *Vassareddy* property which was allotted to him by the settlement made by *Vencatadry*. The proposition of the Appellants is, that, admitting *Ramanadha* was a brother, they became, by the acts of their father, and their own concurrence, divided brothers. We admit there was an allotment, but that did not amount to such a division as is required, by the Hindoo law, to constitute them divided brothers. The Judgment of the *Sudder* Court is founded upon the opinion of the law-officers, with reference to the acts of *Vencatadry*, in his lifetime, and the arrangement of his property,—acts, however, which are insisted upon by the Appellants, as showing that they were divided brothers. This is upon a misapprehension of the principles of the Hindoo law, as applying to the facts of the case. The arrangement made by *Vencatadry* amounts to no more than an agreement to divide; but an agreement to divide property is not effectual, unless the agree-

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ment be executed by an actual division. *Ramanadha* could not be bound by it: until he got possession of his share in severalty, he was not a divided brother. It was an executory agreement only. Such division should have embraced the whole property; and if there was reserved a part of the property, subject to the rules of inheritance, as between the two brothers, that is evidence that they were undivided brothers.

Independently of his title, by adoption or survivorship, *Ramanadha* is entitled to that portion of the *Vassareddy* property which was allotted to him under the settlement made by *Vencatadry*. He is, moreover, the nearest relation to *Vencatadry* and *Jaganadha*; and, as such, entitled, by virtue of relationship, to the succession. We do not rely upon the Will made by *Jaganadha*, in his favour: for the whole inheritance devolved upon *Ramanadha*. The claim of *Lutchmeputty*, as the adopted son of *Jaganadha*, is without foundation. It was clearly established by the evidence in the suit, that he was not adopted by him. Even if proved, it was illegal, under the circumstances of the case, and particularly by reason of the want of concurrence by *Atchama*, to confer on *Lutchmeputty* any right of succession.

Mr. *Kindersley* in reply.

The Right Hon. T. PEMBERTON LEIGH:

29th Feb. 1848.

The question in these Appeals relates to a very large property in the Northern *Circars*, which, in the year 1798, belonged to a *Zemindar*, named *Vencatadry*.

Vencatadry, being childless, on the 2nd of *April* 1798, adopted, as his son, a boy named *Jaganadha*. On this occasion he signed a paper, bearing date the

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7th of *April* 1798. In this paper, after reciting the adoption, he proceeds to say, "Therefore, be it believed, that I have executed this, my tutelar deity bearing witness, that *Jaganadha Naidoo* is *huckdar*, or heir, to my *Zemindary*, *mirasy*, to my wealth and debts; and that I have it not in my power, on any account whatever, to make over (the same) to any other person besides him (*Jaganadha Naidoo*)."

Of the fact, or the validity of this adoption, no question is made. He afterwards became desirous of adopting another boy, named *Ramanadha*, and of dividing his property between them. It is said by the Appellants, and many witnesses have sworn, that he consulted certain *Pundits*, as to the validity of a second adoption, and was advised by them that a second adoption could not be legally made.

It was contended by the Appellants, that upon the whole evidence it was to be inferred that, in consequence of this opinion, although he brought up *Ramanadha* as his son, he never adopted him with those religious ceremonies which were necessary, in order to constitute a valid adoption, according to the Hindoo law. We have no doubt, however, that he did whatever was necessary to constitute a valid adoption, if such second adoption could, by the Hindoo law, be valid.

This last adoption took place in 1807. Various steps seem to have been taken by *Vencatadry*, during the minority of both these boys, with a view to divide his property between them.

In 1815, *Jaganadha* attained the age of eighteen, when, by the Hindoo law, he came of age. After this, in 1816, *Vencatadry* made a new division, between his two sons, *Ramanadha* being still under age, and, as it seems, about nine years old. *Jaganadha* took posses-

sion of the property so allotted to him; and *Vencatadry* seems to have remained in possession of what was allotted to *Ramanadha*. In the course of the year 1816, *Vencatadry* died. *Jaganadha* claimed the whole of the property of *Vencatadry*, alleging that the adoption of *Ramanadha* was invalid, and at all events did not constitute him a co-heir.

Much dispute took place upon this subject, and various proceedings were had before the Board of Revenue, which had seized a large portion of the property, for payment of arrears of revenue. Suits were instituted for the purpose of determining the rights of the parties, into the particulars of which it is not necessary to enter.

The first of the suits, now in controversy, began in 1820, being a suit instituted by *Ramanadha* against *Jaganadha*, to establish his right to that portion of the property which had been allotted to him in his character of adopted son, by *Vencatadry*. This suit was still pending when *Jaganadha* died.

In 1824, a decision was pronounced against *Ramanadha*, from which, however, he appealed; and before the appeal had been heard, and on the 28th of *February* 1825, *Jaganadha* died. He left no natural born issue, but two wives, *Rungama* and *Atchama*, and a boy who had been brought up in his house, and who is said to be his adopted son, named *Lutchmeputty*.

The question then arose, who was entitled to succeed to the estate of *Jaganadha*; the question of what the estate of *Jaganadha* consisted, that is, whether he was entitled to the whole, or only half of the estate of *Vencatadry*, still remaining unsettled. With respect to the right of succession to *Jaganadha*, it is

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not disputed that, if he left a son, whether natural born, or legally adopted, such son would be entitled to succeed. That if he left no son, but an undivided brother, such brother would be entitled to succeed. That if he left no son, nor undivided brother, the widow, or one of the widows, would be entitled to succeed.

On the death of *Jaganadha*, *Ramanadha* set up a title to the whole estate of *Vencatadry*, alleging (not very consistently with his former claim), that he and *Jaganadha* were undivided brothers, and that *Jaganadha* had left no issue, natural born or adopted.

Rungama at first acquiesced in the claim of *Ramanadha*, it being alleged by her that she was deceived by *Ramanadha*, who got authority to act for her, while it is alleged by other of the parties that she colluded with him.

Lutchmeputty was a child of about six years old, and no claim was brought forward on his behalf. *Atchama*, however, instituted a suit, claiming the whole of the estate of *Jaganadha*, and insisted that she was entitled to inherit. Afterwards, *Ramanadha* and *Rungama* having quarrelled, the claim of *Lutchmeputty* was advanced. After long litigation, with various fortune, in the Indian Courts, the *Sudder Adawlut* decided that *Jaganadha* and *Ramanadha* were undivided brothers; and that *Lutchmeputty* was not the adopted son of *Jaganadha*; that consequently *Ramanadha* was entitled to the whole inheritance which had come from *Vencatadry*; and against this decree the present appeals are brought.

The questions for our decision relate, first, to the estate of *Vencatadry*; and, secondly, to the succession of *Jaganadha*.

The conflicting parties are,—First, *Lutchmeputty*, who claims the whole inheritance which came from *Vencatadry*, on the ground that *Jaganadha* was the only adopted son of *Vencatadry*, and that he, *Lutchmeputty*, is the adopted son of *Jaganadha*. Secondly, *Atchama*, who insists that *Lutchmeputty* was not well adopted, and that she, as eldest widow, is entitled to succeed to the inheritance of *Jaganadha*. Thirdly, *Rungama*, who maintains the case of *Lutchmeputty*, but insists, that if he is not the adopted son, she is entitled to share with *Atchama*, in the succession of *Jaganadha*. Lastly, *Ramanadha*, who maintains the decree as it stands.

A further question is made, in which all the other parties concur in contending against *Ramanadha*; that if he was well adopted, and, therefore, a brother of *Jaganadha*, they were divided, and not undivided, brothers; and, therefore, though *Ramanadha* might be entitled to his share of *Vencatadry's* property, he can have no right of succession to *Jaganadha's*.

As far as concerns *Ramanadha*, his whole title depends on the validity of his adoption. If he was not well adopted, he was neither a co-heir with *Jaganadha*, nor heir to *Jaganadha*.

The first question, therefore, is, as to the validity of a second adoption, the first adopted son still existing, and remaining in possession of his character of a son.

This appears to have been long a point of great doubt in Hindoo law, and is stated by the Judges in this case, to be unsettled.

Three classes of authority have been referred to:—First, The opinions of the *Pundits*, appearing in the course of the proceedings; Secondly, The native au-

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thorities, as found in the Hindoo treatises; and Thirdly, The European authorities.

First. As to the *Pundits*; there is considerable difference of opinion amongst them. If the Appellant's evidence is to be believed, a number of *Pundits*, and learned men, gave their opinion against the validity of the adoption, to *Vencatadry*, in his lifetime, and this at a period when their bias would probably be, to favour the wishes of the powerful *Raja* who consulted them.

On the death of *Vencatadry*, there is a certificate signed by 140 Brahmins, that the adoption of *Ramanadha* was invalid. But as this was an opinion produced by *Jaganadha*, then in possession of the estate, but little weight is due to it.

On the other hand, in 1818, before the institution of the suit, by *Ramanadha*, the Northern Provincial Court took the opinion of their own *Pundit*, and of the *Pundits* of the Centre and Southern Division of the Courts, on these questions:—

"1. Is a person having, conjointly with a wife, adopted a son, and thereafter being displeased with her, and marrying a second wife, authorised by Hindoo law, conjointly with her, the second wife, to adopt a son?

"2. A person adopting a son, having for any reason adopted a second son, is the former or the latter heir to the estate of the adopting, or are both sons entitled to share the same?"

These *Pundits*, being at a distance from each other, giving separate opinions at some intervals of time, without, as it appears, any communication between them, all agree in holding, that the second adoption is good, and that both sons are equally entitled to inherit.

These opinions seem to be as free, as any opinion can be, from suspicion of undue influence.

When the case came before the *Sudder* Court, two of the *Pundits* consulted were in favour of the adoption, and one against it. The reasoning of the two *Pundits* in favour of the adoption is certainly very unsatisfactory; but still, so far as the law is to be collected from the opinion of *Pundits*, to be found in this case, the preponderance is in favour of the adoption.

These opinions, however, are by no means conclusive, and the Appellants contend, that the native authorities, upon which they are founded, are strongly against the validity of a second adoption.

These authorities, like the opinions of the *Pundits*, are not reconcileable with each other.

In the Digest of Hindoo Law, on Contracts and Successions, with a Commentary by *Jagannatha*, translated by Mr. *Colebrooke*, the question is discussed and treated as one on which a difference of opinion prevailed. The most material passages of the Treatise are found in pages 386, 389, 395, 397. The author holds the better opinion to be, that an adoption is valid, although a previously adopted son, or even a natural born son, be already in existence; the main foundation of that opinion being an ancient text, "that many sons are to be desired, in order that one may travel to *Gaya*."

It was attempted, in a most ingenious argument, on behalf of the Appellants, to reconcile this authority with others, apparently of a different tendency, by showing that the author intended, not that many sons of the same description might be adopted, but that he referred to sons of different descriptions, of which there were twelve, recognised in the remote

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ages of Hindoo antiquity, though only two are now allowed; the son given and the legitimate son. Another suggestion was, that the author intended only that the second adopted son may have the rights of a son, in the event of the failure of the existing issue, natural or adopted.

We find great difficulty in adopting either of these suggestions. At the same time it must be owned, that the doctrine is not very clearly stated, nor very easily to be reconciled with some of the authorities to which it refers; and with respect to the right of inheritance of the second son, we rather collect the author's opinion to be, that the second son would succeed, as in the case of a son well adopted, by one having no issue, to whom a son is afterwards born, viz. to one third only of his father's estate.

Whatever, however, may be the effect of this practice, its authority is far outweighed by two other Hindoo works, expressly on the subject of adoption, the *Dattaka Mimamsa* and the *Dattaka Chandrika*.

The first passage, sec. i., plac. 3, in the former of these works, is the citation of a text of an ancient sage, *Atri*, in these words, "By a man destitute of a son, only, must a substitute for the same always be adopted." This, perhaps, standing alone, may be held to mean that upon such a one only was it incumbent to adopt a son. The commentary, however, excludes this construction, for it says, sec. i., plac. 6, "By a man destitute of a son only. The incompetency of one having male issue is signified by the term 'only' in this passage." The author then, after quoting a text from *Menu*, much to the same effect with that cited from *Atri*, observes, that the instances of adoption, by certain illustrious persons, of sons, although

they already had male issue, must be considered as exceptional cases, and not as generally authorising the act. In the next paragraph [12] the author seems to concede, that a second son may be adopted, with the sanction of the existing issue.

The *Dattaka Chandrika* (sec. i., plac. 3) cites the same text from *Atri* and *Menu*, and puts the same construction on them, as the *Dattaka Mimamsa*.

We think that these treatises are more distinct than the work of *Jagannatha*: they are written on the particular subject of adoption; they enjoy, as we understand, the highest reputation throughout *India*; and their weight is strong against a second adoption.

In the Ordinances of *Menu*, translated by Sir *William Jones*, we find this passage, in page 313: "He, whom his father, or mother with her husband's assent, gives to another as his son, provided that the donee have no issue, is considered as a son given."

In the *Viva Darnava Setu*, translated by Mr. *Halhed*, ch. xxi., sec. ix., the proposition is distinctly stated, "He who has no son, or grandson, or grandson's son, or brother's son, shall adopt a son; and while he has one adopted son, he shall not adopt a second."

If we are to form our opinion of the law, from the effect of these authorities, we can have no hesitation in coming to a conclusion adverse to the validity of a second adoption.

At the same time it is quite impossible for us to feel any confidence in our opinion, upon a subject like this, when that opinion is founded upon authorities to which we have access only through translations, and when the doctrines themselves, and the reasons by which they are supported, or impugned, are drawn from the religious traditions, ancient usages, and more

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modern habits of the Hindoos, with which we cannot be familiar.

It is satisfactory, therefore, to find that, under the third head to which we have adverted, the European authorities, there is much assistance to be derived from the labours of those who have investigated this subject, with all those advantages of familiarity with the laws and languages of Hindoostan, in which we are necessarily deficient.

Here, unfortunately, as everywhere else, there is some discrepancy in the authorities.

Sir *Thomas Strange*, in his Elements of Hindoo Law, Vol. I. p. 78 (2nd edit.), expresses himself as follows:—"In general it is in default of male issue that the right is exercised, issue here including a grandson, or great grandson. But as there exists nothing to prevent two successive adoptions, the first having failed, whether effected by a man himself, or by his widow or widows after his death, duly authorised; so, even where the first subsists, a second may take place, such having been the pleasure and will of the husband; upon the principle of many sons being desirable, that some one of them may travel to *Gaya*, a pilgrimage considered to be particularly efficacious in forwarding departed spirits beyond their destined place of torture." In support of these propositions, he refers to two cases. *Shamchunder* v. *Narayni Dibeh* (1 Ben. Sud. Dew. Rep., 209), which was decided in 1807; and *Gooreepershaud Rai* v. *Mussummaut Jymala* (2 Ben. Sud. Dew. Rep., 136), which was decided in 1814.

Now, the first of these cases decided only that a second adoption is valid, when the first adopted son has died without issue; a point of law which is not disputed. In the second case, a man having two wives,

gave authority to each of them, to adopt a son. One of them made the adoption. He himself, together with the other wife, afterwards made an adoption; and it was finally held, that the two sons were entitled equally to inherit to the husband.

This was a very peculiar case; it certainly seems to assume the validity of a double adoption; but the doubts in the case seem to have been, rather as to the effect of the second adoption, by the husband himself, in revoking the authority given to the wife, than on the validity of a second adoption, while a first adopted son is living. This decision is also stated by the Court, to be in conformity with the preceding case of *Shamchunder* v. *Narayni Dibeh*, which, in truth, for the reason already mentioned, it in no degree supports.

These, we believe, are the only European authorities referred to, on behalf of *Ramanadha*. With reference to these cases, it may be observed that they have never been considered as settling the law upon this subject. In a note to the case of *Narainee Dibeh* v. *Hirkishor Rai* (1 Ben. Sud. Dew. Rep., 42), which, it seems, was supplied to the Reporter, by Mr. *Colebrooke*, the translator of *Jagannatha's* Digest; he states the point as one of doubt, and on which, although the authority of *Jagannatha* was in favour of the adoption, the weighty authority of the *Dattaka Chandrika* was the other way.

Every European, without any exception, as far as we have any information, who has since examined the subject, has come to a conclusion adverse to the second adoption. In a note to *Strange's* Elements of Hindoo Law, Vol. II. p. 85 (2nd edit.), the law is thus stated by Mr. *Sutherland*, a very high authority:—"A Hindoo cannot have legally adopted children; a son legitimate or adopted existing, any subsequent adoption would

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be invalid; at least the son so adopted would not inherit."

In Mr. *Sutherland's* Synopsis of the Hindoo Law of Adoption, p. 212, he thus expresses himself:—"The primary reason for the affiliation of a son, being the obligatory necessity of providing for the performance of the exequial rites, celebrated by a son for his deceased father, on which the salvation of a Hindoo is supposed to depend, it is necessary that the person proceeding to adopt, should be destitute of male issue capable of performing those rites. By the term issue, the son's son and grandson are included. It may be inferred, that if such male issue, although existing, were disqualified by any legal impediment (such as loss of caste), from performing the rites in question, the affiliation of a son might legally take place."

In Mr. *Steele's* Synopsis of the Law of Hindoo Castes, he states, p. 48:—"An adoption can take place only where no begotten son or grandson exists, or where the begotten son has lost caste." Again at p. 52: "In the case of the death of an adopted son (and total lost of caste is considered equivalent to death), another may be selected and given in the same manner; but a man, after adopting one boy, cannot adopt another, at the desire of a second wife, &c. Only one adopted son can subsist at one time, B. S. (*Mit.*)" It is true that the treatise purports to relate to the customs of the Provinces of *Bombay*; but we are not aware of a difference between the different Provinces, on this point, though there appears to be some minor differences, on other points of the law of adoption, and for this the last section of the *Mitacshara* is referred to. The last paragraph, in this page, seems to be the statement of different opinions collected from

different quarters, and, as might be expected, not very well agreeing with each other.

But by far the most important authority is Mr. *William Macnaghten*, whose Principles and Precedents of Hindoo Law were composed, as appears from the preface, after collecting all the information that could be procured, from all quarters, and after a careful examination of all the original authorities, and of all the opinions of the *Pundits*, recorded in the Supreme Court, for a series of years.

This work was published after his report of the two cases already referred to, and of course he could not but be acquainted with them; indeed, he refers to one of them. Now, Mr. *Macnaghten* states the law, as he considers it be, without the slightest doubt or hesitation. He says, Vol. I. p. 80, "It is clear that a man having adopted a boy, and that boy being alive, he cannot adopt another." And he examines the text, that "many sons are to be desired, in order that one may travel to *Gaya*," and says that it applies only to natural born sons.

We are informed by our very learned Assessor, Sir *Edward Ryan*, that this work of Mr. *Macnaghten's* is constantly referred to in the Supreme Court, as all but decisive of any point of Hindoo law, contained in it, and that much more respect would be paid to it, by the Judges there, than to the opinions of the *Pundits*. Upon the particular point in question, Sir *Edward* adds all the weight of his own high authority, concurring as he does entirely in the law, as stated in *Macnaghten*.

The Judges in the *Sudder* Court state, that they are aware that this has been long considered a doubtful point, and they seem to proceed entirely on the

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opinion of the *Pundits*, who favour the second adoption.

On examining the reasons assigned by those *Pundits*, they rest upon two main points :—

First. The text that "many sons are to be desired, in order that one may travel to *Gaya*."

Second. Upon the doctrine, that he who has only one son is to be considered as childless.

Now, the first of these texts is evidently out of the case, if Mr. *Macnaghten's* explanation be correct; and as to the second, in referring to the passages on which the *Pundits* rest, they manifestly relate, not to a person who receives a child, but to one who gives a child, in adoption.

Upon the whole, therefore, for these reasons, (which, as the point is of great general importance, we have thought it advisable to explain very fully,) we have come to the conclusion, that the adoption of *Ramanadha* was not valid, and that the judgment of the *Sudder* Court upon that point must be reversed.

If we had come to a different conclusion on this subject, it would have been necessary for us to examine into the effect of the deed, alleged to have been executed by *Vencatadry*, on the adoption of *Jaganadha*, and upon which one of the Courts below held that the subsequent adoption was invalid, as far as regarded the right of inheritance; but our view of the first point makes this unnecessary, and also removes all question as to the alleged division between the supposed brothers.

Feeling the hardship of this case on *Ramanadha*, we have looked with some anxiety to see whether his title could be maintained, on the ground, that it was subsequently recognised by *Jaganadha*, and that such

subsequent recognition might be considered equivalent to previous assent.

We think it, however, impossible to maintain his right upon this ground. Supposing *Jaganadha* to have acquiesced, after he came of age, in the division of property made by *Vencatadry*, it was an acquiescence on the footing of a right already asserted by the father, to exist in *Ramanadha*, and it does not appear that *Jaganadha* possessed all the knowledge, or was placed in the circumstances which must exist, in order to make his ratification binding, even if we assume, what is not by any means clear, that such subsequent ratification would be equivalent for that purpose, in Hindoo law, to previous consent. It appears, however, that there was some property, both real and personal, of which *Vencatadry* had the power of disposing; and by an act, *inter vivos*, without the consent of *Jaganadha*; and we think that he made a gift, as far as he could, of his property between his two sons. Applying, then, to this case, a principle not peculiar to English law, but common to all law, which is based on the rules of justice, namely, the principle, that a party shall not, at the same time, affirm and disaffirm the same transaction,—affirm it as far as it is for his benefit, and disaffirm it as far as it is to his prejudice,—we think, that effect must be given against the estate of *Jaganadha*, to the intentions of *Vencatadry*, as far as he had the power of effecting them. If *Jaganadha* takes, as we think he is entitled to do, the whole ancestral property, which the father could not dispose of, without his consent, we think he must give up, for the benefit of *Ramanadha*, the whole property included in the division, to the disposition of which, his consent was not necessary.

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Ramanadha, being removed from the contest, as to the succession of *Jaganadha*, the question as to that succession is in dispute between *Lutchmeputty* and *Atchama*; for *Rungama*, though she may have the same interest with *Atchama*, in opposing *Lutchmeputty*, supports his title.

This is a mere question of fact, upon which, as in almost all cases from *India*, the evidence is contradictory, and the decision must turn very much upon the probabilities of the case, to be collected from those facts, which are sufficiently established.

In the year 1819, the situation of *Jaganadha* was as follows: He had married two wives; but had never had any issue by either of them. He is stated by some of the witnesses to have been, from bodily infirmity, very unlikely to have issue. This is so far confirmed by undisputed facts, that he lived for six years afterwards with *Rungama*, and never had any issue. He might, therefore, reasonably presume, or perhaps knew, that he should have no natural born son, or, at all events, no such son, by *Rungama*.

With *Atchama* he had quarrelled, in *April* 1819; and previously to the alleged adoption, she had quitted his house, to which she never seems to have returned, till after his death. Under these circumstances, it cannot but be held probable, that he should choose to adopt a son. But this probability is much confirmed, when we consider the relation in which he stood towards them, who, if he left no issue, natural or adopted, would succeed to his great possessions. Either *Atchama*, with whom he had quarrelled, would take alone, or jointly with *Rungama*; or *Ramanadha*, with whom he was at law, and whose character of a brother he denied, would succeed. Nothing is more

natural than that he should desire to disappoint these parties.

Now, it is proved, beyond all question, by the evidence of Mr. *Roberts*, the Collector at *Masulipatam*, that in the course of the years 1824 and 1825, a boy of an age corresponding with that of *Lutchmeputty*, and who, by other evidence, is shown to have been *Lutchmeputty*, was brought by *Jaganadha*, upon several occasions on which he paid a visit at the Collector's office, and that the boy was treated by *Jaganadha*, and considered by him, the Collector, as his adopted son; he says that the boy accompanied *Jaganadha* upon every visit except the first; that he had frequent communication with *Jaganadha* on the subject; that he considered the boy was brought, in order that he might be recognised as an adopted son; and that so satisfied was he, Mr. *Roberts*, of the facts, that on *Jaganadha's* death, in the absence of evidence to the contrary, he should have considered him as heir.

The question then is, was this boy well adopted or not?

The account given by the Appellant is this, that in *March* 1819, *Chava Naidamah*, a relation of *Jaganadha*, had a son born to him; that *Rungama*, by the desire of *Jaganadha*, applied to the grandfather of the child, to know if the family would give this child in adoption to *Jaganadha*; that difficulties were suggested as to the right of *Jaganadha* to adopt any of the *Soodra* class; that he consulted the *Pundits*, who gave an opinion in favour of such adoption, on the 23rd of *April*; that this opinion was communicated to *Chava Naidamah*, who, on the 26th of *April*, signed an instrument giving his son to *Jaganadha*, who signed an instrument accepting the boy in adoption; and that

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on the 18th of *August* 1819, all the necessary ceremonies of adoption were performed, and a certificate of the performance endorsed on the instrument, containing the opinion of the *Pundits*, and signed by twelve persons present at the adoption.

These instruments are produced, and the facts tending to this conclusion are sworn to, by a vast number of witnesses. There appears to us to be no objections to this testimony, beyond the observation, which may be made on all Hindoo testimony, that perjury and forgery are so extensively prevalent in *India*, that little reliance can be placed on it.

But the important fact, that this boy was brought up and treated as an adopted son, does not depend merely on Hindoo testimony. That there was such a boy, and that he was considered as likely to succeed, is proved, not only by Mr. *Roberts* and his clerk, who, though, from his name, (*Custoory Setaputty*,) we presume is a Hindoo, appears to give evidence without the slightest bias, but also by a letter written, or rather forged, by, or on behalf of, *Atchama*, in the name of *Jaganadha*, dated just before his death.

In this letter, *Jaganadha* is made to state, that *Rungama* was teasing him to leave his estate to *Lutchmeputty*. The words are:—"*Rungama* troubles me much to leave, by writing, the *talook*, &c., to *Chava Lutchmeputty*, of another *gotrum*, whom she, *Rungama*, has been taking care of; but I have not consented to it." This document, together with the forged Will in favour of *Atchama*, were produced in Court, on the 12th of *May* 1825, immediately after *Jaganadha's* death.

Now, the case made by *Atchama* is, that *Lutchmeputty* was a boy first brought forward some time after

the death of *Jaganadha*, and that he never was at *Amaravaty*, the residence of *Jaganadha*, in his lifetime. This is clearly contrary to the fact, and contrary to the fact, as known to *Atchama*, and yet many of her witnesses, who say that they were in *Jaganadha's* house at the time when the alleged ceremonies of adoption took place, and that no such ceremonies in fact took place, swear also that *Lutchmeputty* was never at *Amaravaty*, till after the death of *Jaganadha*. Such evidence can go for nothing.

There are two circumstances, and only two, which, no doubt, are much against the adoption.

First. The conduct of *Rungama*, who now brings forward this claim of *Lutchmeputty*, but who suppressed all mention of it, as it is said, till the quarrel between *Rungama* and *Ramanadha*, in 1826. Secondly. The absence of proof of any formal notification to the Government, and of that degree of notoriety which might be expected of a fact of so much importance, in such a family.

As to the first point, there is no doubt, that for several months after the death of *Jaganadha*, *Rungama* not only was silent as to the title of *Lutchmeputty*, but she acquiesced in that of *Ramanadha*, and signed several instruments, quite inconsistent with the case which she now sets up.

It is attempted to remove the effect of these acts by saying, that she was under the influence of *Ramanadha*, and signed whatever papers were laid before her, in ignorance of their contents, or even blank papers to be afterwards filled up.

There is some evidence that she did sign blank papers; and the fact, that if *Lutchmeputty* was not entitled, she had herself a strong claim to participate

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with *Atchama*, in the succession of *Jaganadha*, affords a strong inference that, in supporting the claim of *Ramanadha*, she was deceived by him, unless she was acting in collusion with him, under some secret arrangement.

We cannot say, that we are satisfied as to the imposition alleged to have been practised upon her; and if we were dealing with her rights, we should attribute much weight to this part of the case; but we cannot attribute much weight to it: perhaps, in strictness, we ought not to attribute any, when we are dealing with the rights of *Lutchmeputty*, and when the effect of the acts relied on, is removed, alike by supposing collusion with *Ramanadha*, or imposition by him.

Secondly. With respect to the absence of any formal notification to the Government, it is admitted, on all hands, not to be necessary. At the same time, it affords so easy a mode of preserving unquestionable evidence, of a most important fact, that, in the case of a great family like this, some written communication would, most probably, be made either on the occasion of the adoption itself, or on some subsequent occasion: and we find, accordingly, that communications were made to the Government, by *Vencatadry*, with respect to the adoption, both of *Jaganadha* and *Ramanadha*, and that he endeavoured to have their title recognised. The absence of any such communication in the case of *Lutchmeputty* is, therefore, important.

There are, however, circumstances in evidence, by which the weight of the objection is very considerably diminished. The adoption was resolved upon in *April* 1819. *Amaravaty* was in the Collectorship of *Guntoor*; and, at this time, *Jaganadha* was at law with

the Collector of *Guntoor*, who refused to deliver up possession of some portions of the property of *Vencatadry*, claimed by *Jaganadha*.

It is not, perhaps, very unnatural to suppose that, under such circumstances, *Jaganadha* would not, willingly, have any communication with the Collector, not absolutely necessary. But there were other disputes at this time, between *Jaganadha* and the Government authorities. *Atchama*, or her brothers, on her behalf, had complained to the civil magistrate of the conduct of *Jaganadha* towards her, and he had been fined.

From some of the documents, there seem to have been other differences subsisting between them. That, at a subsequent time, there was some written communication to the Collector of *Masulipatam*, in which district a portion of this large estate was situated, there is much reason to believe. A most important letter upon this subject, purports to be a letter from *Jaganadha* to his wife, and has much internal evidence of authenticity. It is dated 13th of *July* 1819, and is in these words :—" As *Puntooloo* has sent me a letter, enclosing a foul *arzee* to the authority, on the subject of our adoption of a boy, I caused it to be copied fair, and despatched it this day through the *Vakeel*, because I thought it is proper ; and the said *arzee* was received by the junior gentleman, who is vested with the authority of magistrate. There was enmity before between us and certain persons in this place, owing to one's malevolence against us ; and it has now occasioned enmity between us and another man, as well as between us and the authorities of this place, in consequence of the authorities of the Circuit Court having been pleased to expose the calumny used by the persons in

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this place against us; consequently there will happen obstacles to our affair; but I am not uneasy, as there does not appear anything that can be supported by the said persons regarding the circumstances, which is now intimated to us. I herewith send the copy of the said *arzee*, and will inform you the remaining circumstances on my arrival at that place."

If this letter be genuine, it is almost conclusive. I observe that one of the Judges below states that the handwriting of this letter is not proved; but that, at all events, it is of no consequence, because in fact it is before the adoption, and could not prove that the adoption had taken place. In the enormous mass of documentary and parol evidence, to be found in this case, far exceeding anything which, in our experience, has been brought before this Committee, it may be difficult to say, whether it is or not regularly proved; but it seems to have been produced in evidence, without any objection being made to its authenticity.

The objection which is made to it by the Judge, certainly is not well founded. The transaction of the adoption might not have been completed, at the date of the letter, because the usual ceremonies had not been performed, which are represented to have taken place in the following *August*; but the transaction was inchoate: the child had been given in adoption and received in adoption, in the preceding *April*, and the terms of the letter are, therefore, perfectly applicable to the state of circumstances which existed at the date.

Upon this state of the evidence, the probability of the adoption, certainly of a child being brought up in the family, and introduced to the European authorities, with the same state and pomp as if he were an adopted

son, with documents and witnesses in great numbers, confirming the account, which documents and witnesses are open to no other suspicion than attaches to all Hindoo evidence, we should have had no hesitation in affirming the fact of adoption, if the case had come before us as an original cause.

We have been pressed, however, and very properly pressed, with the argument that this is a mere question of fact, to be proved by evidence; that all the Judges before whom the case has come, have disbelieved the evidence; that they had some advantages in coming to a conclusion which we have not, and that their judgments are to be considered, as verdicts of a jury, which ought not to be disturbed, except upon very strong grounds.

It is impossible not to feel that there is great weight in these observations, and they have occasioned one of the principal difficulties which we have felt, in this most difficult case; we have, however, the same evidence which was in the Court below. We have had the advantage of a most full and able discussion, at the Bar; and this Court is more accustomed to the examination of evidence, than the civil servants of the East India Company, who preside in the native Courts, can be supposed to be. We have further the great advantage of having the grounds on which these judgments proceeded. We cannot say that they are at all satisfactory to our minds. By far the most important evidence in the case, the evidence of Mr. *Roberts*, is disposed of, by assuming that this gentleman, in his deposition, and in a communication which he made to the Board of Revenue, entirely in the same sense, immediately on the death of *Jaganadha*, lay under a misconception of what had passed in a conversa-

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tion, in a language which was not vernacular to either party.

This appears to us a purely gratuitous assumption: it would have been a strong assumption if Mr. *Roberts's* opinion had been formed from a single conversation; but he states, that he had frequent communications with *Jaganadha*, upon the subject; that the boy was brought to him by *Jaganadha*, four or five times; was treated by the *Raja*, as his son; and was brought, as he considered, in order that his title as such might be known and recognised. His opinion is founded, not merely on what he heard, but what he saw, not on one, but on several occasions.

Supposing the fact of adoption to be proved, some objections were made to its validity, in point of law; but they do not appear to us to be of any value.

Upon the whole, after a very long and anxious consideration of the subject, we feel ourselves called upon to differ upon this point also, with respect to the adoption, from the judgment of the Court below, and to hold that *Lutchmeputty* was well adopted, and is entitled to succeed to the whole estate of *Jaganadha*, subject to such maintenance, as his widows may by law be entitled to.

Our report to Her Majesty will be, that as to *Puttoory Caly Doss*, (who seems to have been very improperly made a party to the proceedings,) the Appeal ought to be dismissed, with costs. That the decree of the Court below ought, in other respects, to be reversed. That it should be declared, that the adoption of *Ramanadha* was invalid, and that he was not entitled to be considered as a co-heir with *Jaganadha*, to *Vencatadry*; but that, under the circum-

stances appearing in evidence, he was entitled to such property included in the gift made by *Vencatadry*, after *Jaganadha* came of age, as *Vencatadry* had the power to dispose of. That *Ramanadha* was entitled to retain those portions of such property which came into his possession, and to have restored to him such portions thereof as came into the possession of *Jaganadha*, or to have compensation made for them, out of the estate of *Jaganadha*. That the adoption of *Lutchmeputty* by *Jaganadha* was well proved, and that *Lutchmeputty* was entitled to succeed to the whole estate of *Jaganadha*. That with these declarations, the cause should be remitted to the Court below, with directions to do what may be necessary for giving them effect. That no costs ought to be given in these Appeals, or in the suits below, except to *Puttoory Caly Doss*.

MUNNI RAM AWASTY - - - *Appellant*,

AND

SHEO CHURN AWASTY and MUSSAMAT NEEUT KOOER - - - } *Respondents.**

On Appeal from the Sudder Dewanny Adawlut at Bengal.

2nd, 3rd, & 4th Dec. 1846.

By deeds of *farigh-kutti* (release) and *ikrar-nama* (acknowledgment), entered into by parties to a suit then pending, a compromise was agreed upon, in consideration of Rs. 2,000, to be paid by the Defendants to the Plaintiff, the Plaintiff undertaking to execute and deliver in to the Court, a deed of *razi-nama*; which the Plaintiff afterwards refused to execute. Held by the Judicial Committee of the Privy Council, affirming the *Sudder* Court's decree, that the deeds of *farigh-kutti* and *ikrar-nama* constituted a binding obligation on the Plaintiff, and that he could not avoid the compromise, by refusing to execute and enter up the *razi-nama*.

The Plaintiff instituted the suit, *in formâ pauperis*, and by the terms of the deed of compromise, the Defendants undertook to pay the costs, upon his entering up the *razi-nama*. The Courts in *India* sustained the compromise, and decreed the Plaintiff to pay, out of the consideration-money to be received by him, the costs incurred subsequent to the deeds of compromise. Such decree affirmed on Appeal.

Semble. Although the Courts in *India* admit a party to Appeal to *England*, *in formâ pauperis*, yet the Appellant ought to make a special application to the Queen in Council, for leave to prosecute such Appeal, *in formâ pauperis*.

THIS Appeal arose out of a suit, originally instituted in the Provincial Court of *Patna*, by the Appellant, suing, *in formâ pauperis*, against *Muddun Mohun Awasty* (the husband of the Respondent, *Mussamat Neeut Kooer*) and *Sheo Churn Awasty*, for the pay-

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir E. H. East, Bart., and Sir E. Ryan, Knt.

ment of S. Rs. 85,135. 12., being the amount of a fourth part or share of certain effects, estates, in villages, houses, orchards, immoveable and moveable property, together with the produce of the *khiraj* and *la-khiraj* villages, situate in the *pergunnas Nurhut Roh* and *Pilluh*, in the presidency of *Bengal*, the entire amount of which was estimated at the sum of S. Rs. 340,543, then in the possession of the Defendants, who were carrying on in partnership together the business of *mahajuns*, or bankers, in the town of *Shahabad*.

The Plaintiff claimed as the son of *Sheo Lal Awasty*, one of the five sons of *Nyne Sookh Awasty*, the eldest son of *Bholanath Awasty*, the common ancestor and founder of the family, against the Defendants, the sons of *Deokishen Awasty*, the son of *Sookhnundun Awasty*, the second son of *Bholanath Awasty*, insisting that the descendants of the common ancestor were an undivided family, and that the capital, &c., was the joint property of the Defendants and himself.

On the 26th of *January* 1815, the Plaintiff filed his plaint, *in formâ pauperis*, in the Provincial Court of *Patna*, against *Muddun Mohun Awasty* and *Sheo Churn Awasty*, in which he traced his descent with the Defendants, from their common ancestor, *Bholanath Awasty*, and alleged that a partnership subsisted from his time down to the present, and claimed to be put in possession of a fourth part or share of the real and personal estate then belonging to the Defendants, to the amount before stated.

The Defendants, by their answer, denied that the Plaintiff, or *Nyne Sookh Awasty*, through whom he claimed, had any interest in the house at *Shahabad*, or any other estates belonging to them, and then

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in their possession, insisting that the whole of their property was created and acquired by their own exertions, or those of their immediate ancestor, and was unparticipated in by the Plaintiff's ancestor, and could not, therefore, be claimed by the Plaintiff; they insisted also that the suit was barred by the *Bengal* Regulations of Limitation, III. of 1793, and II. of 1805.

The Plaintiff, by his reply, contended that the suit was taken out of the operation of the Regulations of Limitation, the claim being for hereditary property of a partnership, still subsisting.

At this stage of the cause, the Defendant, *Muddun Mohun Awasty*, died, leaving the present Respondent, *Mussamat Neeut Kooer*, his widow, and *Chintamun* and *Balgovind*, his sons, who were minors, co-heirs, surviving.

In support of the alleged partnership, the Plaintiff filed a *sharakat-nama*, or deed of partnership, dated 11th *Katik*, *Sumvut* 1858 (1801-2 A.D.), and produced some accounts and letters, but no proof was given of their authenticity, or of anything to connect them with the Defendants.

An order was issued by the Provincial Court, directing that the Defendants should be called on for the books of their house from the year 1787 to 1807-8 A.D. It appeared however that these books had been accidentally destroyed by a fire in the year 1810-11.

The Plaintiff presented a *durkhast* tendering a list of sixteen witnesses, to prove the above deed of partnership, and also that his grandfather's (*Nyne Sookh Awasty's*) property was partnership property, and undivided. Of the whole of these witnesses, the Plaintiff

eventually produced only three, who were examined by the Court.

On the 26th of *April* 1819, and subsequently to the examination of these witnesses, the Plaintiff executed a *farigh-kutti*, or deed of release, and discharge of the suit, to the Defendants, in the following form :—

" Whereas, I entered an action, as a pauper, in the *Patna* Provincial Court, for one-fourth share in the cash, property, &c., belonging to the house at *Shahabad* alias *Saheb-gunge*, *zilla Bahar*, on an affirmation of my grandfather's and father's partnership therein, and demanding that they be divided, and that I be put in possession thereof, rated at Rs. 85,135. 12., including the three-fold and eighteen-fold *malguzary* and (yearly) produce of the *khiraj* and *la-khiraj* villages, against *Muddun Mohun Awasty* and *Sheo Churn Awasty*, sons of *Deokishen Awasty*, son of *Sookhnundun Awasty*; and after *Muddun Mohun Awasty's* death, conformably to the revised petition, against *Mussamat Neeut Kooer*, widow of the said deceased, the guardian of *Chintamun Awasty* and *Balgovind Awasty*, minor sons of the above, deceased, which suit is pending in the Court aforesaid. Whereas *Deokishen Awasty*, the father of the Defendants aforesaid, in *Sumvut* 1845, during the lifetime of his father, *Sookhnundun Awasty*, was, together with his dependents, separated, and had his victuals distinct from his own father and brothers, and without receiving any share in his grandfather's and father's property, came from *Futtoohabad* to *Saheb-gunge*, where he established his residence; and, by his own exertions, having carried on trade, and the business of a *shroff*, at the said town, and conducted by himself the concerns of the house, unparticipated by any individual, till 1847 *Sumvut*, from the profits

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thereof created and acquired the cash, property, dwelling-houses, orchards and villages, which he possessed, unparticipated and unoccupied by any other person, and which, after his deccase, descended by inheritance to his sons, that is, to the Defendants, and are in their possession and occupancy. In these, neither I nor my brothers have any claim or right; but whatever outstanding demands and price for goods sold, were (due) at the time the business was carried on by *Sookhnundun Awasty* and *Sungum Lal* aforesaid, first at *Boniad-gunge*, and afterwards at *Saheb-gunge*, till *Aghun*, 1847 *Sumvut*, and which the said *Deokishen Awasty* collected, conformably to a *mokhtar-nama* and *ikrar-nama* of *Sungum Lal Awasty*, out of these one-eighth share belongs to me. I have, therefore, with my own free will and consent settled this action among ourselves. By the terms of this settlement, the sum of Rs. 2,000 account, mine and my brother *Doorga Awasty's* eighth share (after deducting *Sungum Lal's* debts to the *Mahajuns*, and the quarter share for the said *Deokishen's* right account, his trouble, and the shares of his other brothers and partners), is due to me and to my brother by the Defendants aforesaid, which, that is, the sum of S. Rs. 2,000 in question, I have taken from the Defendant aforesaid, and have received, and have appropriated and applied it to mine and my brother's uses, and have relinquished and withdrawn the residue of my claim in the above-mentioned case, property, articles, cash, dwelling-houses, orchards, estates, or villages aforesaid, the possessions and occupancies of the father of the Defendants, and their own. And neither the Defendants aforesaid, nor their successors, have or shall have any right, title, claim in, or litigation for, the

property, articles, dwelling-houses, dues or orchards, &c., appertaining to the town of *Futtoohabad*, &c., *zilla Cawnpore*, the possessions and occupancies of myself, of my brother, and of my uncles. The costs of the Court are agreed to be at the responsibility of the Defendants." This instrument was signed by the Appellant, and was witnessed by three witnesses, named *Ram Chund*, otherwise *Ram Persad*, *Kokil Chund*, and *Bhoop Sing*.

On the 30th of the same month, the Appellant executed an *ikrar-nama*, or deed of acknowledgment, in the Respondents' favour, in the following form :—

"Whereas, I entered an action, as a pauper, in the *Patna* Provincial Court, for the division of, and entry into, the property and estates belonging to the house at the town of *Shahabad*, alias *Saheb-gunge*, *zilla Bahar*, against *Muddun Mohun Awasty* and *Sheo Churn Awasty*, and, after the death of *Muddun Mohun Awasty*, against *Mussamat Neeut Kooer*, widow of the said deceased, the guardian of *Chintamun Awasty* and *Balgovind Awasty*, minor sons of the said deceased. Now I, by my own free will and consent, have taken Rs. 2,000 as my eighth share in the dues and price of goods sold at the time the deceased *Sungum Lal Awasty's* business was carried on, which were (outstanding) till *Sumvut* 1847, and have executed and delivered a deed of *farigh-kutti* and *la-dava* to the said Defendants, by which a *razi-nama* in the above suit was effected. And the sum of Rs. 1,000 has been fixed by the Defendants as the share of the widow of my uncle *Sheo Das Awasty*, deceased, (who lives with me, and is without issue,) out of the amount collected account the dues and price of the goods sold aforesaid; I, therefore,

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engage and give in writing that I will deliver in a *razi-nama* in my action, conformably to the above conditions, to the Provincial Court, and will get a *farigh-kutti* executed to the Defendants by the widow of my uncle *Sheo Das Awasty*, deceased, within two months, and deliver the same to them, at which time I will receive the sum of Rs. 1,000 aforesaid, and until I shall have got the *farigh-kutti* executed by the *Mussamat* above mentioned, the Rs. 1,000 in question shall remain in deposit with *Ram Persad Muhessree*, *Mahajun*, inhabitant of the town of *Shahabad*. Further, I engage and give in writing, that should the widow of the deceased *Sheo Das Awasty* aforesaid make hereafter any demand whatever on the Defendants, beyond the Rs. 1,000 in question, the answer thereto shall rest with me, and with this (responsibility) the Defendants shall be wholly unconnected and unconcerned. This writing has, therefore, been executed as an *ikrar-nama*, that it may be of use, when required."

In pursuance of the conditions of the first-mentioned instrument, the Defendants paid the sum of Rs. 2,000, which was deposited with *Ram Persad Muhessree*, and an undertaking given by him to hand the money to the Appellant, upon the *razi-nama* being delivered in. The Appellant, however, afterwards declined to deliver in the *razi-nama*, or to stay the proceedings in the action.

The Defendants, in consequence, presented a *durkhast*, together with the deed of *farigh-kutti*, to the Provincial Court, stating the Plaintiff's refusal to perform his part of the agreement.

On the 4th of *August* 1819, the Plaintiff and Defendants were summoned before the Provincial Court: the *farigh-kutti* was shown to the Plaintiff, and he was

asked, "Did you, or did you not, execute and deliver this *farigh-kutti* to the Defendant? and if you did execute it, what is the reason you do not submit a *razi-nama*?" The Plaintiff stated, "My *Hinduvi* signature, affixed to the *farigh-kutti*, is authentic and genuine, but the Defendant got me to sign this *farigh-kutti*, by a deception; that is, the Defendants engaged that I should inspect, and have explained to me, the books and accounts of *Sookhnundun Awasty's* and *Sungum Lal Awasty's* concerns, which *Deokishen Awasty* collected, receive therefrom one-eighth share, which is my right, and execute and deliver him a *farigh-kutti*; and *Sheo Churn Awasty*, one of the Defendants, said to me, 'Do you, in the first place, execute a paper, stating that an accommodation has been determined on; and, afterwards, do you understand, and take whatever your eighth share may amount to by the accounts. I will pay it you hereafter.' I then signed this paper."

Upon this reply, the Provincial Court were of opinion, "that the Plaintiff having acknowledged the *farigh-kutti*, delivered in by the Defendant's *vakeel*, it is deemed unnecessary to call the witnesses to prove it; but the Plaintiff having declared, that the *farigh-kutti* aforesaid was executed on the condition that the accounts should be explained (to him), the Court ordered two of the witnesses to the *farigh-kutti*, *Ram Persad* and *Kokil Chund*, to be examined, who deposed to the due execution, and denied that any stipulation or engagement had been made by the Respondents to explain the books to the Appellant.

The case came on for hearing, on the 6th of *September* 1820, before Mr. *William Malcolm Fleming*, who delivered the following Judgment: "As the Plaintiff

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adduces a variety of objections to the *farigh-kutti*, above-mentioned, which have been entered at length in the proceeding of the 4th of *August* 1819, and as, exclusive of that consideration, the Plaintiff has not taken the amount stated in the *farigh-kutti* aforesaid, nor delivered in a *razi-nama*, in the usual form, the decision of this suit, on a *farigh-kutti* of that nature not carried into execution, is deemed exceptionable."

On the 26th of *April* 1821, the Provincial Court of *Patna* (Mr. *John Sandford*, Judge,) pronounced its decree, the material portion of which was in the following terms:—"It is adjudged that the Plaintiff's action is liable to dismissal, for two reasons; the first is as follows:—that the Plaintiff aforesaid made an adjustment with the Defendants, and took the sum of Rs. 2,000, his own share, and executed and delivered to the Defendants the aforesaid *farigh-kutti*; and that he acknowledged the *farigh-kutti* in this Court. As to his demur, that the deed in question was on condition of the explanation (to him) of the accounts and books of the concern of *Sookhnundun Awasty* and *Sungum Lal Awasty*, this point is in no shape proved, inasmuch as there is no condition whatever entered therein. On the contrary, it is stated that they made an adjustment among themselves, regarding the *luhna* price of property sold, and the rest of *Sookhnundun Awasty's* and *Sungum Lal Awasty's* concern, and that, by the adjustment, the sum of Rs. 2,000 was found due, account his (the Plaintiff's) eighth share, and that he had received it from the Defendants; nor, from the depositions of the witnesses, entered in the margin (of the deed), does it appear that there was any condition and verbal engagement regarding an explanation of the accounts. Thus,

such exceptions, on the part of the Plaintiff, are inadmissible by the Court. Now, notwithstanding all these facts, and his having received the money, the Plaintiff's excepting against the *farigh-kutti* on an idle pretext, is manifestly a fraud."

It was therefore ordered,—That the Plaintiff's claim be dismissed, and that he pay the whole costs of suit; and, in the event of his property being to be found, that it be liquidated therefrom.

The Appellant presented a petition of appeal, *in formâ pauperis*, to the *Sudder Dewanny Adawlut* of *Bengal*.

The Appeal was set down, in the first instance, for hearing before Mr. *Courtney Smith*, the Second Judge, who recorded his opinion, that the claim of the Appellant for a fourth share was untenable, inasmuch as if his claim was just and well-founded, he was only entitled to a sixteenth share in the partnership concern, and that the decree of the Provincial Court ought to be annulled, and the Appellant declared entitled to receive from the Respondents, without interest on the *wasilat*, the sum of Rs. 19,764. 13., as well as entry into a sixteenth share of the real estate; and then he ordered that the papers be laid before the sitting of another Judge.

The proceedings were then laid before Mr. *John Herbert Harrington*, the Acting Senior Judge, by whom the cause was heard; he recorded his opinion as follows: —"The Appellant's claim against the Respondents, for more than the Rs. 2,000, admitted by the Respondents, is not, in my opinion, proved and established, for the following reasons:—1st. The *sharakat-nama*, dated 11th *Katik*, *Sumvut* 1858, or 1st *November* 1801, filed by the Appellant, in the Provincial Court, is

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without signature, nor has it, in any shape, been established; but even had it been proved, adverting to the failure of the houses, as stated therein, in *Sumvut* aforesaid, a paper of this nature cannot be a substantial and valid plea in proof of the Appellant's partnership in the house of *Saheb-gunge*, which was open in *Sumvut* 1859, in the firm of *Sheo Churn* and *Muddun Mohun*, and is to this day carried on in their names. Nor has the partnership of the Appellant's father, and of the Appellant himself, in the said house, from the time it was opened, in 1859 *Sumvut* aforesaid, till the institution of this suit, in *January* 1815, been satisfactorily proved by any other document or depositions of witnesses. 2nd. Adverting to the above statement, and to the period of twelve years, which is the term fixed by cl. 14, Regulation III. of 1793, for the hearing of suits of this nature, the Appellant's claim, from the length of time which had elapsed, was not eligible to hearing; and had the Respondents not agreed to pay the sum of Rs. 2,000 (account of the share in the *luhna*, &c., property belonging to the house in partnership at *Saheb-gunge*, till *Sumvut* 1847, which was carried on in the firm of *Sookhnundun* and *Sungum Lal*, and the *luhna* and property of which was collected by *Deokishen*, the predecessor of the Respondents, conformably to a *makhtar-nama*, of *Sungum Lal*), the Appellant's action was, pursuant to the Regulation aforesaid, subject to rejection *in toto*, and would have been dismissed; but as the Respondents, notwithstanding the Appellant receded from settling this suit, for the sum of Rs. 2,000, according to the *farigh-kutti* and *ikrar-nama*, signed by the Appellant, dated the 26th and 30th of *April* 1819, have acknowledged the said sum to be justly due from them to the Appellant, account his share in the *luhna*

in partnership aforesaid,—for that reason the causing the Respondents to pay that sum to the Appellant is, in the decision of this suit, just. From the contents of the *farigh-kutti* aforesaid, it appears that, in case this suit should be settled by the delivering in of a *razi-nama*, on the part of the Appellant, the Respondents consented to pay the costs of suit independent of the Rs. 2,000 aforesaid. But as the Appellant has not delivered in a *razi-nama*, and that disputes and heavy charges, account fees to *vakeels*, &c., in the Provincial Court, and in this *Adawlut*, have been also thereby occasioned; therefore, the costs of both parties in this are not, according to the *farigh-kutti*, justly payable by the Respondent. Conformably to the Regulations and the usual forms, it becomes necessary that (with the exception of the regular costs on the Rs. 2,000 out of the Appellant's claim, which, by the above exposition, is due from the Respondents) the remaining costs of both parties, account of the residue of the Appellant's claim, which has not been established, be paid from the Appellant's property, provided it can be met with; and until the property of the Appellant shall be found (who has entered this prosecution and appeal, *in formâ pauperis*), the one half of the fees of the Respondents' vakeels be paid them by the Respondents. Adverting to the difference between my opinion and that of the Second Judge of this Court, the sitting of another Judge of this Court for a decision and conclusive order in this case is indispensable. Ordered, therefore,—That the whole of the papers, together with the present proceeding, be brought forward at a sitting of another Judge of this Court."

The proceedings were then brought before Mr. *Cuthbert Thornhill Sealy*, who directed a reference to the

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Provincial Court, to take the evidence of *Bhoop Sing*, the third attesting witness to the *farigh-kutti*, and who had not been examined as to the due execution of the instrument, and the statement at the time of its execution, of any agreement or stipulation, as alleged by the Appellant.

This witness was accordingly examined. His evidence confirmed the other attesting witnesses, before examined, and negatived any such agreement or stipulation having ever been made.

On the 30th of *November* 1825, Mr. *Cuthbert T. Sealy* recorded his opinion, and made his final decree in the suit, concurring with the reasons of the Acting Senior Judge, and declared that it appeared to him, that the *farigh-kutti* and *ikrar-nama* signed by the Appellant, dated the 26th and 30th of *April* 1819, were in every point of view conclusively substantiated, and that the Appellant's claim, beyond Rs. 2,000, admitted by the Respondents, was in no shape proved; therefore, as his opinion corresponded and concurred with the opinion of the Acting Senior Judge of the Court, a conclusive order and decree was passed, and the *fysala* of the *Patna* Provincial Court, dated the 26th of *April* 1821, directed to be modified, in the following manner: "That the Appellant's claim to the amount of Rs. 2,000, admitted by the Respondents, be awarded; that the residue of the Appellant's claim, which has not been proved, be dismissed and rejected; that costs proportionate to the Rs. 2,000 aforesaid be payable by the Respondents, and the remaining costs of the parties, account the residue of the Appellant's claim, be entered at the Appellant's responsibility; that for the present, in consequence of the Appellant's pauperism, out of the fees on the Respondents'

part, which are deposited in the treasury of this Court, half be paid to the *vakeels*, and the other half, on the Respondents furnishing the receipt, be repaid to them, and that in the event of the Appellant's property being found, the whole of the costs be paid therefrom."

The Appellant applied for leave to Appeal from the above decree, *in formâ pauperis*, pursuant to cl. 6, Reg. XXVII. of 1814, which was allowed. The Appeal now came on for hearing.

Mr. *Buller*, Q.C., Mr. *Jackson*, and Mr. *Forsyth*, for the Appellant.

By the Hindoo law, the *primâ facie* supposition is, that every Hindoo family is an undivided family, *Strange's* Hindoo Law, 225 (2nd edit.), and the *onus* lies upon those who claim a separate estate, to prove that it was separately acquired. *Dhurm Das Pandey* v. *Mussumat Shama Soondri Dibiah* (*a*). In this case, the hereditary partnership in the house at *Shahabad* is sufficiently proved. The Court below made no decision on the merits, but proceeded entirely upon the deeds of *farigh-kutti* and *ikrar-nama*. These deeds, not having been followed up by a *razi-nama*, cannot be held to be conclusive against the claim of the Appellant, and so it was held, in the first instance, by Mr. *Fleming*, in the Provincial Court. The *farigh-kutti* was but an escrow, which was to take effect upon a certain condition to be performed, namely, the production of the books and accounts of *Sookhnundun* and *Sungum Lal Awasty*. The *farigh-kutti* was conditional and imperfect, and incapable of being carried into execution. *Mehunt Ramper-*

(*a*) 3 Moore's Ind. App. Cases, 229.

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shaud v. *Mehunt Odaungir* (*a*). The *Bengal* Regulations of Limitation do not apply to this case, as the cause of action does not arise until the property is divided. Admitting the validity and conclusiveness of the deed of *farigh-kutti*, the decree is erroneous, inasmuch as it does not give the Appellant the costs of suit, up to the date of that deed, as well as the proportion of costs since that date, on the sum due to him under the *farigh-kutti*.

Mr. *Wigram*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondents.

The Appellant is bound by the *farigh-kutti* executed by him, the same being for a valuable consideration. There is no ground for disputing the validity and effect of that instrument. The claim made by the Appellant was absolutely barred by the *Bengal* Regulations of Limitations, III. of 1793, and II. of 1805. He had no right or title either in himself, or his ancestors, to share in the proceeds of the banking business, carried on by *Muddun Mohun Awasty* and *Sheo Churn Awasty*.

Lord LANGDALE:

This is an Appeal from the *Sudder Dewanny* Court, in a suit in which the Appellant was the Plaintiff, in the Provincial Court of *Patna*. He alleged himself to be one of a numerous family, which had not been divided, or in any way separated. He claimed to be entitled to a certain share, of what he stated to be the common and undivided property of the family. The plaint was filed so long ago as the month of *January* 1815. The answer put in by the Defendants, (the now Respondents,) to that action, contained a denial

(*a*) 1 Ben. Sud. Dew. Rep., 188.

of the Plaintiff's right. A replication and rejoinder was filed, the parties proceeded to the examination of witnesses, and two were examined on the part of the Plaintiff, and one on the part of the Defendant. There had been directions given for the production of some documents, which however were not produced, in consequence of their having been, as was alleged, lost, or destroyed by fire.

It was in that state of things, that a proposal for a compromise seems to have been made. It does not distinctly appear from whom that first proceeded, nor is it in any degree material: it came to a conclusion in the month of *April* 1819. It does not appear to have been entered into with any haste or precipitation; on the contrary, sufficient time was taken for deliberation, the time which was asked for by the Plaintiff himself, in order that he might choose what he considered a lucky day, for the completion of this assignment to him; but on the 26th and 30th of *April*, he signed two documents, one of which is called a *farigh-kutti*, the other an *ikrar-nama*. In the *farigh-kutti*, after the introduction, which does not appear to be material to be stated at length, he says, "I have, therefore, with my own free will and consent, settled this action among ourselves:" by the terms of this settlement, the sum of Rs. 2,000 "account, mine and my brother *Doorga Awasty's* eighth share (after deducting *Sungum Lal's* debts, &c.), is due to me and to my brother, by the Defendants aforesaid, which (that is, the sum of Rs. 2,000, in question) I have taken from the Defendants aforesaid, and have received, and have appropriated and applied it to mine and my brother's uses, and have relinquished and withdrawn the residue of my claim in the above-mentioned case, &c.; and neither the Defendants aforesaid, nor their

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successors, have, or shall have, any right, title, claim in, or litigation for, the property, articles, &c., the possessions and occupancies of myself, of my brother, and of my uncles. The costs of the Court are agreed to be at the responsibility of the Defendants." On the 30th of *April*, he executed the other instrument, called an *ikrar-nama*; and there he stated, "Whereas I entered an action as a pauper in the *Patna* Provincial Court, for the division of, and entry into, the property and estates belonging to the house at the town of *Shahabad*, alias *Saheb Gunge*, *Zillah Bahar*, against *Muddun Mohun Awasty* and *Sheo Churn Awasty*, and after the death of *Muddun Mohun Awasty* against *Mussamat Neeut Kooer*, widow of the said deceased, the guardian of *Chintamun Awasty*, and *Balgovind*, minor sons of the said deceased. Now I, of my own free will and consent, have taken Rs. 2,000, as my eighth share in the dues and price of goods sold at the time the deceased *Sungum Lal Awasty's* business was carried on, &c., and the sum of Rs. 1,000 has been fixed by the Defendants, as the share of the widow of my brother, *Sheo Ram Awasty*, deceased, (who lives with me, and is without issue,) out of the amount collected, the account, the dues and price of the goods sold aforesaid; I, therefore, engage and give in writing, that I will deliver in a *razi-nama*, in my action, conformably to the above conditions, to the Provincial Court, and will get a *farigh-kutti* executed to the Defendants, by the widow of my uncle *Sheo Das Awasty*, deceased, within two months, and deliver the same to them, at which time I will receive the sum of Rs. 1,000, aforesaid, and until I shall have got the *farigh-kutti* executed, by the *Mussamat* above-mentioned, the Rs. 1,000 in question shall remain in deposit with *Ram Persad Muhassere*."

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Now taking these two instruments together, (which were cotemporaneous,) they amount to a decided agreement for the settlement of this action; by that agreement, Rs. 2,000 were to be paid to the Plaintiff, and he signed a receipt upon it—"I have received Rs. 2,000;" and the same instrument says, "I engage and give in writing, that I will deliver in a *razi-nama*." Two things, therefore, seem to be understood by this instrument: one is, a relinquishment of the claim made in the suit, and the other an engagement to deliver in a *razi-nama*; and this was in consideration of the Rs. 2,000. The Rs. 2,000 were forthcoming from that moment; but at the time that this *farigh-kutti* was executed, there was something else to be done, for both these instruments were executed out of Court, they were not instruments to be delivered to the *kazi*, to put an end to the cause, and, therefore, it is stipulated, that, in addition to the former instruments, the Plaintiff should give in a *razi-nama*, expressing his satisfaction on record; and while that was pending, it would not have been prudent to give over the Rs. 2,000, or to give security for the payment thereof. What was done, which was the natural course of proceeding, was this: the Rs. 2,000 were not to be paid over, because the *razi-nama* had not been delivered, but the Plaintiff was not to be left without some security, and, therefore, he had delivered to him a sort of note, or bond for the execution of these instruments, leaving the *razi-nama* to be delivered on the part of the Plaintiff.

Upon this, matters appear to have ended, and thus remained down to the time when the dispute arose, no *razi-nama* having been delivered in. The Plaintiff insisted that he was in no respect bound by the *farigh-*

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kutti, or deed of release, because it had been obtained by fraud, and he alleged some circumstances, by which fraud was to be inferred. One of those was, that it had not been properly sealed by the *kazi*: there were several other things more particularly mentioned; one of them, to which the greatest weight seems to have been attached, is that, cotemporary with these instruments, there had been another agreement entered into between the parties, that notwithstanding the statement, of the specific sum of Rs. 2000, mentioned three times over in the *farigh-kutti*, and also in the *ikrar-nama*, as given by the Plaintiff, it was not intended that he should be bound by that sum, but that there should be an account taken of what might be due to him, upon the footing of his original claim; and this was alleged by him in the Court below as the reason why he should not be bound by the *ikrar-nama*.

Now we have attended to this matter, with all the care we could, and to what has been stated by the learned Counsel, and we have looked through all the papers; but we cannot find the slightest evidence, that there ever was any such agreement. The Plaintiff's witnesses were cross-examined on the subject, but they wholly denied the existence of such an agreement, or understanding: so much credit was however obtained for the statement, that it produced a great deal of litigation; and the Plaintiff even obtained a decision, that this instrument was not to be considered sufficient to stop the proceedings. It appears to their Lordships that that decision is very extraordinary. We should not have adverted to it at all, if the Counsel for the Appellant had not done so: and with great reasonableness on their part, because they wish to avail themselves of everything they can, they say, here we have the Judg-

ment of Mr. *Fleming* in our favour, upon this point; he did not consider that the *farigh-kutti* was binding.

Now what are the reasons which he gives for that opinion? He refers to the former proceedings, and to the examination of the witnesses, and then he says, "As the Plaintiff adduces a variety of objections to the *farigh-kutti*, above-mentioned, which have been entered at length in the proceedings of the 4th of *August* 1819," —there is not a word about this having been proved,— "and as exclusive of that consideration,"—that is, the consideration of the Plaintiff adducing them,— "the Plaintiff has not taken the amount stated in the *farigh-kutti*, aforesaid,"—not in the least stating the reason why he did not take it, or considering whether it might, or might not, have been his own fault that he had not got it,—"nor delivered in a *razi-nama* in the usual form,"—he had not done that which he had covenanted to do,—"the decision of this suit on a *farigh-kutti* of that nature not carried into execution is deemed exceptionable." This opinion amounts to this, that because the Plaintiff has entered into an engagement, which he does not like to perform, he is, therefore, not bound to perform it. Their Lordships cannot see that there is any weight to be attached to a decision founded upon such reasons.

The matter, however, went forward in consequence of this decision, and the proceedings were afterwards laid before Mr. *John Sandford*, when the Plaintiff's claim was dismissed, and he was ordered to pay the whole costs of the suit.

There were then other proceedings before Mr. *Courtney Smith*, who seemed to have formed a more favourable opinion of the validity of the instrument, and then the case went before Mr. *Harrington*, and afterwards

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before Mr. *Sealy*; and it strikes us as a conclusive fact, that Mr. *Harrington*, after having examined all the evidence, thought that the Defendants had not made out any case, independent of the *farigh-kutti*. It is not necessary for us to consider that point, because we think that the case is concluded by the *farigh-kutti*, and that without reference to the evidence of *Bhoop Sing*, which with great ingenuity is shown to be erroneous; but looking merely to the other evidence, with the inferences which are necessarily to be drawn from it, there is not the slightest suggestion, that the Plaintiff might not have had his money from the first moment after the execution of the *farigh-kutti*: it was there ready for him. There was an act to be done by him, to entitle himself to it, viz., by the giving in the *razi-nama*, and that act he never did; but he cannot avail himself of his own neglect. It appears, therefore, to their Lordships, that so far as relates to the dismissal of this plaint, the decree was perfectly correct.

There arises a question as to the costs. The *farigh-kutti* contains the clause, which has been so often referred to—"The costs of the Court are agreed to be at the responsibility of the Defendants;" therefore, if the Plaintiff had performed his duty according to his engagement, in entering up a *razi-nama*, and had then received the Rs. 2,000, he would have received those Rs. 2,000, quite free from any charge of costs, and the Defendants would have had to pay the costs below; but it does not follow that the Defendants would be responsible for all the costs, which were afterwards incurred, in consequence of the unsuccessful and apparently most unjust litigation, in reference to the Plaintiff's claim, and which he instituted and carried on, for the purpose of freeing himself from the obligation

entered into by the *farigh-kutti*. There seems to be no reason at all for that, unless by his suing as a pauper; he ought not to be subject to any costs. But he was not strictly suing as a pauper, for it cannot fail to strike us, as subject to some question, looking to these proceedings, the propriety of his being allowed to sue, *in formâ pauperis*. It appears, by this *farigh-kutti*, that he had some property. It appears, further, that that property had been made subject to attachment, and had been actually attached; there was real property, and there was property in deposit, property which was attached after the decree was pronounced.

Although, therefore, the Appellant has declared himself a pauper, he is, in fact, not a pauper; and notwithstanding he possessed property in dwelling-houses, and houses, and has had in deposit Rs. 2,000, with *Turn Chund* and *Utna Ram*, he has sworn that he is a pauper. The Plaintiff is proved to have Rs. 2,000, and he is shown to have other property, because there has been an attachment issued. The order which is made upon that, is only material for the purpose of showing, that in this case there was no attempt to make him personally liable to the payment of the costs, but only out of this property. The order is, "that the Judge is to be careful to issue the decree of this Court, and to obtain payment of the sum of Rs. 2,000, entered in the *Teep*, from *Ram Persad, Mahajun*. Moreover if, conformably to the Respondents' statement, any other property belonging to the Appellant, in the town of *Futtoohabad*, may have been attached, or may now be obtained, by the Respondents pointing it out, the same be sold by public sale, and therefrom paying the Respondents the sum of Rs. 394. 1. 18. 3., costs of this Court, and also the costs of the Provincial Court."

Now that sum of Rs. 394, the sum which appears

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as coming for costs after the Defendant's former amount, has been paid, by the arrangement pursuant to the decree, which is appealed from. Whether it was intended to include it in the Rs. 2,000, the property in question, amongst the property out of which the Rs. 394 were to be paid, does not seem at all to be material, for the result at which their Lordships think they ought to arrive, is, that the costs which are ordered to be paid after this litigation, are costs to be paid out of the property: therefore, we think there is no inconsistency in doing so in this particular case.

Their Lordships, therefore, will report to Her Majesty, that, in their opinion, this Appeal must be dismissed.

There is one observation now arising, upon which their Lordships are ready to hear any information which can be given to them by Counsel. Leave was granted by the *Sudder* Court, to appeal, *in formâ pauperis*. It does not appear that there has been any order, in this country, authorising him to sue, *in formâ pauperis*.

Mr. *Moore*:—In appeals from the colonies, it is the practice to apply by Petition here, for leave to prosecute the Appeal, *in formâ pauperis*. *Brouard* v. *Dumaresque* (*a*). A different practice, however, prevails in cases where the Appeal is prosecuted by the East India Company, under an Order in Council, made in virtue of the Act, 3 & 4 *Will.* IV., c. 41, sec. 22. An Appeal being allowed by the *Sudder* Court, in *India*, *in formâ pauperis*, pursuant to Ben. Reg. XXVIII. of 1814, the Appeal is prosecuted without any order being made here. *Rany Srimutty Dibiah* v. *Rany Koond Luta* (*b*).

(*a*) 3 Moore's P. C. Cases, 457. (*b*) 2nd Dec. 1847.

REWUN PERSAD - - - - *Appellant,*

AND

MUSSUMAT RADHA BEEBY - - *Respondent.**

On Appeal from the Sudder Dewanny Court at Allahabad, in Bengal.

3rd & 4th Dec. 1846.

Effect given to an instrument, in the nature of a testamentary disposition, made by a Hindoo, domiciled in the North-West Provinces of *Bengal.*

By this instrument, the Testator gave his widow a life estate, in all his property, and after her decease he gave a moiety thereof to his brother B., and his sons, C. and D. B. and C. died in the lifetime of the tenant for life. C. and D. were divided brothers. C.'s widow claimed his share. Held by the Judicial Committee,—

I. That C. and D. took vested interests in the moiety, as tenants in common, the actual enjoyment of the expectant interest being postponed till the termination of the life estate.

II. That in such circumstances, it was not necessary that C.'s share should be reduced into possession, during his lifetime, to enable his widow to succeed to it.

Semble.—That the instrument itself would have operated as a division of the property given, so as to prevent D., who survived, succeeding to his deceased brother's share, as an undivided brother.

THIS was an Appeal from a decision of the *Sudder Dewanny Adawlut*, for the North-West Provinces, held at *Allahabad*, dated the 29th of *April* 1839, and pronounced in favour of the Respondent, in a suit instituted by her, against *Dial Das*, and *Mussumat Rookmin*, the widow of one *Goonee Lal*, and the Appellant, in the *Zillah* Court of *Mirzapoor*, to recover the fourth

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir E. H. East, Bart., and Sir E. Ryan, Knt.

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part of the assets, moveable and immoveable, of one *Fakir Chund*, deceased, after deducting Rs. 25,000 on account of *sadaburt*, and accounting for the half-share of the aforesaid *Goonee Lal* and *Dial Das*, and the fourth share of the Appellant, in the sum of Rs. 669,600, and also for recovery of a moiety of Rs. 20,000, belonging to the widow of one *Beekhary Das*, to which claims, respectively, the Respondent became entitled under a deed, in the nature of a testamentary disposition, executed by *Fakir Chund*, on the 5th of *March* 1814, A.D. The parties were of the Hindoo caste of *Agrawala*, and their respective rights were regulated by the Hindoo law, prevalent in *Benares* and *Allahabad*.

The facts of the case were as follow:—

Cheyn Sookh, the common ancestor, had three sons, viz., *Bhowany Persad*, and *Fakir Chund*, and *Beekhary Das*. Of these, the first son, *Bhowany Persad*, had issue two sons, *Goonee Lal*, who died before the institution of this suit, leaving a widow, named *Mussumat Rookmin*, and a son named *Dial Das*. The second son, *Fakir Chund*, died without issue. The third son, *Beekhary Das*, had two sons, named *Koonj Behary* and *Mudun Mohun*. The first, *Koonj Behary*, died, leaving a widow, the Respondent, but no male issue. The second, *Mudun Mohun*, died, leaving issue, one son, named *Rewun Persad*, the present Appellant.

The three sons of *Cheyn Sookh* separated during the lifetime of their father, and carried on mercantile and commercial transactions separately, becoming thereby a divided Hindoo family.

After the separation of the family, *Fakir Chund* and *Beekhary Das*, with their separate estates, entered into a partnership concern, managing banking and

mercantile affairs in coparcenary, but at the close of each year accounting to each other for the profits and loss of the partnership, which was debited and credited to their respective names, in the books.

On the 5th of *March* 1814, *Fakir Chund* executed a deed, in the nature of a testamentary instrument, in triplicate, the material part of which was in the following terms:—

"After my decease, of the half-share of the mercantile establishments, belonging to me of right, my widow (*Mussumat Mehtaboo*) shall be the mistress and disposer. If, during the lifetime of my widow, my brother, *Beekhary Das* aforesaid, or my nephews, to wit, *Koonj Behary Lal*, and *Mudun Mohun*, and *Goonee Lal*, and *Dial Das*, shall lay any claim to the half-share of the mercantile establishments, mine by right, it shall be held false; my widow is the mistress and disposer of the half-share belonging to me, the Declarant. Touching acts of religion, endowments, and alms, and other acts, good and bad, and, moreover, whatever she pleases, she is competent to perform. Let no one molest her. After the decease of my said widow, whatsoever may remain of the property under her control, let it be disposed of as follows, to wit, Rs. 20,000, let the wife of *Beekhary Das*, my brother, take. In the event of her not surviving till then, let the sons of my said brother take the same. Rs. 25,000 for the expenses of '*sadaburt*,' shall be deposited in some creditable house of business. After the above-mentioned two items, whatever of houses, orchards, go-downs, cash, woollen and other goods, may remain after the use of my said widow, let my brother, *Beekhary Das* aforesaid, and, after the death of my said brother, his sons, take one half, and let *Goonee Lal*,

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and *Dias Das*, who are the sons of *Bhowany Persad*, my deceased brother, take the remaining half."

This deed was also signed by his brother, *Beekhary Das*, and his nephews, *Dial Das*, *Goonee Lal*, *Koonj Behary*, and *Mudun Mohun*.

At the death of *Fakir Chund*, his widow succeeded to, and entered into possession of, her deceased husband's estate.

Beekhary Das died in the year 1817. In the year 1819, *Koonj Behary* and *Mudun Mohun*, his sons, divided the paternal estate between them, and afterwards lived separate, as divided brothers. In the year 1825, *Koonj Behary* died, leaving the Respondent, his widow, and several daughters, but no male issue, surviving, when the Respondent took possession of the divided estate of her husband. *Mudun Mohun* died in the year 1829, leaving *Rewun Persad*, the present Appellant, surviving.

In the year 1833, *Mussumat Mehtaboo*, the widow of *Fakir Chund*, died.

Upon her death, *Dial Das*, the brother of *Goonee Lal*, the surviving son of *Bhowany Persad*, took possession of the whole estate, in consequence whereof *Rewun Persad* brought a suit against him, for recovery of a moiety of the share of the deceased *Beekhary Das* in *Fakir Chund's* estate, resting his claim under the deed executed by *Fakir Chund*. In this suit, the Respondent intervened, claiming a fourth share of the entire estate of *Fakir Chund*.

By the Judgment of the *Zillah* Court, which was affirmed on appeal, by the *Sudder Dewanny Adawlut*, *Rewun Persad* was put in possession of the whole of the property.

In consequence of this decree, she instituted, on the

1st of *June* 1835, a suit in the *Zillah* Court of *Mirzapoor*, against *Dial Das* and *Mussumat Rookmin*, the widow of *Goonee Lal*, to recover the fourth part or share of the assets of the moveable and immoveable estate of the deceased *Fakir Chund*, after deducting the sum of Rs. 25,000 on account of *sadaburt*, and deducting the half-share of *Goonee Lal* and *Dial Das*, and the fourth share of the Appellant; and also to recover the half-share of Rs. 20,000, the interest of the widow of *Beekhary Das*, deceased, founding her title to such property as the widow of *Koonj Behary*, by virtue of the devise over to the children of *Beekhary Das*, contained in the deed above-mentioned.

Rewun Persad intervened in the suit as *Oozadar*, (one claiming an interest in the subject-matter of the suit,) and on the 4th of *July* 1835, filed a petition, wherein he admitted that no commensality existed between *Koonj Behary* and his father, *Mudun Mohun*, and that they lived and ate separately, but insisted that he alone was the heir of *Koonj Behary*, and that the Plaintiff, as the widow of *Koonj Behary*, was only entitled by the *Sastras*, to what was necessary for religious acts, food and raiment.

On the 17th of *July*, in the same year, the Respondent put in an answer to this petition of intervention, denying that any interest existed between her deceased husband, and *Mudun Mohun*, insisting that they were divided brothers.

Neither *Dial Das*, or *Mussumat Rookmin*, appeared or put in any answer to the plaint.

In the course of the suit, the Respondent filed a deed of adjustment between herself and *Dial Das*.

The nature of the evidence produced, will be seen from the judgment.

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The cause came on for hearing before Mr. *Henry H. Thomas*, who, on the 11th of *November* 1836, delivered his judgment, the material part of which was as follows :—

"As the right of *Rewun Persad*, and of *Mudun Mohun*, his father, with reference to *Koonj Behary*, the uncle of the *Oozadar*, has been established by the records in the suit above mentioned; and as *Rewun Persad* has, accordingly, been judged to be entitled to the share of his father and uncle, and a decree for a half-share of the estate of *Fakir Chund*, deceased, having been passed in favour of *Rewun Persad*, in accordance with the deed, executed by *Fakir Chund*, (the *Oozadar* of Plaintiff having been overruled,) the Plaintiff in this suit is only entitled to maintenance and expenses, for bestowing alms, and for worship, from *Rewun Persad*. On these grounds the suit of Plaintiff, for the share of her husband, *Koonj Behary*, is bad. The deed of adjustment filed by her cannot be admitted, as this deed of adjustment prejudices the claim of *Rewun Persad*, and is opposed to my decision passed in the suit above referred to. Plaintiff, moreover, ought to have sued *Rewun Persad*." On these grounds it was, therefore, ordered, "that the deed of adjustment be rejected, the claim of Plaintiff dismissed, and the objection of *Rewun Persad* admitted."

The Respondent appealed from this decision, to the *Sudder Dewanny Adawlut*, held at *Allahabad*, which Court, on the 24th of *May* 1837, in remitting the cause for the re-consideration of the *Zillah* Court of *Mirzapoor*, delivered its opinion in the following terms :—"It is very evident that the real Defendant in this suit is *Rewun Persad*, the *Oozadar*, notwith-

standing which, Plaintiff has omitted to make him a Defendant, in consequence of which it is not possible to try and decide upon her claim. If the *Zillah* Judge thought that the Plaintiff had wilfully, in collusion with, and under the instigation of, *Dial Das*, omitted to make *Rewun Persad* a Defendant, it behoved him to have nonsuited the claim, directing Plaintiff to bring a fresh suit, including the name of *Rewun Persad*; but if he thought that Plaintiff's not making *Rewun Persad*, aforesaid, a Defendant, was an act of pure inadvertence, and ignorance of the practice of Courts, he ought to have directed Plaintiff to put in a supplemental plaint, making *Rewun Persad* a Defendant, and after the supplemental plaint had been filed, the party summoned, the answer taken, the evidence to the matters contained in the claim required from Plaintiff, and evidence in refutation from the Defendant, and after going fully into the investigation, disposing of the objections of both parties, and ascertaining whether or not Plaintiff had any title under the *Sastras*, to the estate of *Fakir Chund*, he ought then to have taken up and decided the case. But this has not been done; consequently the decision of the *Zillah* Judge, dismissing the claim of Plaintiff, Appellant, passed without observance of the above points, is evidently improper and imperfect, and its reversal imperative. Ordered, therefore, that the decision of the Judge of *Zillah Mirzapoor*, dated 11th of *November* 1836, be reversed; that the original papers received from the *Zillah*, together with a copy of this proceeding, be forwarded to the Judge of *Zillah Mirzapoor*, directing him to bring the suit again on its former number on the file, and having given consideration to the points above adverted to, to do what he may consider proper."

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In obedience to this order the cause was reinstated on the file of the *Zillah* Court, and on the 12th of *July* 1837 the Respondent filed a supplementary plaint, making *Rewun Persad* a party to the suit, and claimed the same amount against him she sought to recover in her original plaint.

On the 17th of *August* 1837, *Rewun Persad* put in an answer to the supplemental plaint, wherein he submitted, that the Plaintiff had no title as heir, according to the *Sastras*, current in that part of the country, to the property in question; that no division of *Fakir Chund's* estate having taken place in the lifetime of *Beekhary Das*, or his sons, *Mudun Mohun*, and *Koonj Behary*, he, *Rewun Persad*, became, in virtue of his title aforesaid, the sole heir; and he insisted first, that the division of the entire estate of *Beekhary Das*, between *Mudun Mohun* and *Koonj Behary*, was not a complete division; and, secondly, that even if such division had taken place, the Plaintiff's claim was inadmissible by the *Sastras*, by reason of the estate remaining in joint partnership between *Mudun Mohun* and *Koonj Behary*, and the division thereof being contingent on the demise of *Mussumat Mehtaboo*.

To this the Respondent filed a replication, in which she asserted, that *Koonj Behary* and *Mudun Mohun* divided between them whatever of the estate was available at the time of the division, and that as it was not the custom of the family to execute a deed of division, so none was necessary; she stated also, that high and low of the residents of the city of *Allahabad*, and *Mirzapoor*, could bear testimony to the fact of the division of the estate of *Beekhary Das*, between the two brothers; and with reference to the objection, that

the estate of *Fakir Chund* had not been divided, she said that this event was made contingent on the death of *Mussumat Mehtaboo*, and that the estate could not be divided before the occurrence of that event.

The Appellant rejoined, that proof of the partition of the estate of *Beekhary Das* was nothing to the purpose, as that was a matter not in dispute, but that the Respondent had wilfully avoided saying aught touching the division of the estate of *Fakir Chund*, deceased, the property disputed in this suit; and that as the husband of the Respondent had died without issue, in the sense of the Hindoo law, having left no son, who could inherit the undivided property, the Appellant, being the male issue, was entitled, under the *Sastras*, to the undivided shares of his father and uncle, in the estate of *Fakir Chund*, deceased. The Appellant also prayed, that a *bewusta* might be called for from the *Pundit* of the Court.

The cause again came before Mr. *Henry H. Thomas*, and, on the 29th of *November* 1837, that Judge delivered his judgment, the material part of which was as follows:—"In my opinion, the argument drawn by Plaintiff from her title to her husband's estate, in order to prove her right to the undivided estate of *Fakir Chund*, is insufficient. The divided property is that property which was divided between *Beekhary Das* and *Fakir Chund*, and on the death of *Beekhary Das*, *Koonj Behary* and *Mudun Mohun*, the sons of the deceased, got possession of his share. Between this property, and the property of *Fakir Chund*, there is no connection, for *Fakir Chund* was the master, and in possession of his half-share, without the coparcenary of any other person, and had uncontrolled power to give away his property, to whomsoever he pleased; accord

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ingly, he executed a Will." The Court then read the testamentary instrument made by *Fakir Chund*, and proceeded thus:—"After the death of *Fakir Chund*, her husband, the said female continued in possession, and controlled the whole of her husband's estate, until her death, agreeably to the said Will. *Koonj Behary*, Plaintiff's husband, and *Mudun Mohun*, Defendant's father, who were the sons of *Beekhary Das*, died before the said *Mehtaboo*; under these circumstances, agreeably to the *Sastras*, I consider *Rewun Persad*, Defendant, to be heir to both these deceased persons, as regards the undivided estate of *Fakir Chund*, and that Plaintiff has no claim in that estate, except that she receive food and clothing, and the expenses for charity and worship, from *Rewun Persad*. Under these circumstances the claim of Plaintiff is considered inadmissible." It was, therefore, ordered, that the claim of Plaintiff be dismissed, with costs of the *Sudder* and of the *Zillah* Court.

The Plaintiff appealed to the *Sudder Dewanny Adawlut*, of the North-West Provinces at *Allahabad*: and that Court, on the 14th of *March* 1838, delivered its judgment, declaring that the Court below had miscarried, in not calling for a *bewusta* from the *Pundit* of the Court, or of some other *Zillah*, on the question of Hindoo law; and ordered, "that the decision of the Judge of *Zillah Mirzapoor*, dated 29th *November* 1837, be reversed, and that he again bring the case on in its original number, retaining it in his own Court, or making it over to the principal *Sudder Amin*; and that the Judge of the Court by which it might be entertained, should call upon Defendant to state whether he acknowledges or denies the division alleged by Plaintiff to have been made between her husband and

Defendant's father. That after taking the answer from Defendant, a *bewusta* be called for from the *Pundit* of the Court, on the following points, viz.:—Supposing the division of the paternal estate alleged by Plaintiff to have taken place between the husband of Plaintiff and the father of Defendant, can Plaintiff have any claim to the undivided estate of *Fakir Chund*, as the right and share of her husband? and in the event of this claim on the part of Plaintiff being admissible, under the *bewusta* of the *Pundit*, then, in the event of the division being proved, and Defendant denying it, that evidence be called for from each of the parties, and after entering into the necessary inquiries with reference to the division, before mentioned, he should try and decide the case."

In pursuance of this direction, the *Zillah* Court ordered that the suit be made over to the principal *Sudder Amin* for trial.

There being no *Pundit* attached to the *Zillah* Court of *Mirzapoor*, the *Sudder Amin* submitted a case to the *Pundit* of the *Zillah* Court of *Allahabad*, wherein, after stating the circumstances of the case, he required an answer to the following questions:—"Should the widow of the son of the childless person's second brother claim the share of her husband, in the undivided estate of the childless person, is such claim admissible under the *Sastras*, or not? Again, if the share of the Plaintiff's husband has not been divided off, from the share of his full brother, or his full brother's sons, and should the Plaintiff's husband die, leaving the whole of his substance which was undivided, in the possession and seisin of his brother's sons, in such case is his widow entitled, under the *Sastras*, to cause

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the brother's sons to divide the property, and give her her husband's share?"

To these questions the *Pundit* returned the following answers:—

1. "The law under the *Sastras* is this: If any person, separating himself from his brothers, die, and his widow enter on his estate, she is undoubtedly competent to cause the separation of any fraction thereof which may remain; a widow, except through the intervention of her husband or her son, has no title whatever. If a widow, on the ground that the estate of her husband's father had been divided between her husband and his brother, claim the estate of the childless uncle of her husband, such estate having become '*guttuns*,' that is, not having come into the possession of her husband before he died, such claim is inadmissible, according to *Yajnyawalcya Rishi*, contained in the *Mitacshara*, in the division named *Vyavahara*, patra (leaf) 111, page 2, line 7; also according to the *Vira Mitrodaya*, patra 196, page 2, line 7, as contained in the *Vivada Chintamani* and *Vivada Chandra*."

2. "A person dying, while united with his brethren, without issue, his widow is entitled to nothing beyond food and clothing."

Upon the receipt of these answers, and on the 14th of *September* 1838, the principal *Sudder Amin* passed his decree, which was as follows:—"The *bewusta* of the *Pundit* having been received, in tenor as above, it appears, therefore, that the suit of the Plaintiff is inadmissible; and as, with reference to the order contained in the proceeding of the *Sudder Dewanny*, no further inquiry into the title of Plaintiff becomes

necessary,"—It was ordered, therefore, that the suit should be dismissed, with costs.

From this decree, the present Respondent appealed to the *Sudder Dewanny Adawlut* at *Allahabad*, and on the 10th of *December* 1838 filed her reasons of appeal, controverting the correctness of the *bewusta* of the *Pundit*; to which the present Appellant subsequently put in an answer.

At this stage of the proceedings, both parties agreed upon a statement of the facts, and requested that the opinion of the *Pundit* of the *Sudder* Court should be obtained upon it. This statement set forth, that " after the death of *Beekhary Das*, viz. in 1819, *Koonj Behary* and *Mudun Mohun* parted the paternal estate between them," and in other respects set forth the facts as hereinbefore stated. And the *Sudder* Court submitted this case for the opinion of the *Pundit*, with the following questions:—First,—" Is *Mussumat Radha Beeby*, the widow of *Koonj Behary*, entitled, under the *Sastras* current in these parts, that is to say, in *Benares* and *Allahabad*, to the interests of her husband in the property belonging to the estate of *Fakir Chund*, aforesaid, (which remained in the seisin and possession of his widow till the year 1833 C.E.,) agreeably to the deed executed by the said *Fakir Chund*, in the same manner that *Rewun Persad* had claimed the interests of his father, *Mudun Mohun*, or is she not?"

To this question, the *Pundit* returned answer, that " under the deed executed by *Fakir Chund*, aforesaid, *Mussumat Radha Beeby* has as good a right to the share of *Koonj Behary*, her husband, in the estate of *Fakir Chund* and his wife, on the ground of her being his widow, as *Rewun Persad* has to the share of *Mudun Mohun*, his father, on the ground of his being his son.

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Although a widow cannot claim undivided property, on the ground of its being her husband's share, yet as it is evident that the disputed property cannot be considered as property held in join coparcenary by *Mudun Mohun* and *Koonj Behary*; because they had separated, and during their lifetime they had not obtained possession of it; to apply the word 'coparcenary' to property which has not yet come into possession, simply on the expectation of receiving it, is incorrect. Undivided property is that property which is in the possession and power of two partners; but the disputed property which has descended through the intervention of the names of *Mudun Mohun* and *Koonj Behary*, must be considered undivided, until, after possession, it is divided between the son of *Mudun Mohun* and the widow of *Koonj Behary*. Now, there is no doctrine which forbids the title of the widow of *Koonj Behary*, who is separated, in property of this nature, which is held jointly. According to the *Sastras* current in these parts, and with reference to the successive grades of the right of heirs, neither the son of *Mudun Mohun*, nor the widow of *Koonj Behary*, has any title to the estate of *Fakir Chund*, because in such property, after the brother and the brother's son, the grandfather and others have their title; consequently, it is apparent that, in such property, the son and widow of the brother's son cannot have a right of inheritance; but according to the deed executed by *Fakir Chund*, both are equally entitled, while, without the said document, neither has any right, and in this respect both stand on an equality as regards precedence, *Fakir Chund* having made possession by the sharers, mentioned in his deed, conditional on the death of himself and of his widow, and not having acknowledged their

right so long as his widow should be living; and as *Mudun Mohun* and *Koonj Behary*, who divided the paternal estate between them, were alive some time after, and died before the widow of *Fakir Chund*, and as the widow of *Fakir Chund* died some years after their death, the sharers mentioned in the said deed are, therefore, entitled to the estate mentioned in the said deed, on the death of the widow of *Fakir Chund*. But *Mudun Mohun* and *Koonj Behary* died before they got possession of the property; consequently, after their death, their heirs derive their only right to the disputed property from the said deed; for, on the ground of the right of inheriting from *Fakir Chund* or *Beekhary Das*, their title is not acknowledged by the *Sastras*, because *Fakir Chund*, in the deed executed by him, has made the right of *Mudun Mohun* and *Koonj Behary* to commence after the death of *Beekhary Das*. On these considerations, therefore, *Rewun Persad* and the widow of *Koonj Behary* have a right in this property, and there is no precedence of one before the other, in this right; seeing that the said property has accrued after division. This *bewusta* is in accordance with the *Mitacshara*, and other books current in these parts. First Authority.—' The doctrine of *Yajnyawalcya* contained in the *Mitacshara* and *Vira Mitrodaya*: First, the widow, after that the daughter, after that the daughter's son, after that the mother and father, after them the brother, after him the brother's son, and after him the *gotraja* and others, are the heirs of a childless person.' Second Authority.—'The doctrine *Vrihat Menu*, contained in the before-mentioned books: The widow of a childless man, keeping unsullied her husband's bed, and offering the *pind*, shall receive his property.' "

Second Question.—" Of the two persons, viz. *Rewun*

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Persad and *Radha Beeby*, the widow of *Koonj Behary*, who becomes the heir of *Koonj Behary*, agreeably to the *Sastras*, in respect to the estate mentioned in the deed of the said *Fakir Chund*?"

To this question, the *Pundit* returned the following answer:—"While the widow is living, the brother's son cannot become the heir. The other points will be apparent from the answer to the first question."

Third Question.—"Assuming, agreeably to the denial of *Rewun Persad*, that the division, &c., alleged by Plaintiff to have been made of the paternal estate, between *Koonj Behary*, Plaintiff's husband, and *Mudun Mohun*, the father of *Rewun Persad*, did not take place; in such case, who is the lawful claimant and heir, and entitled to the interest of *Koonj Behary*, as regards the disputed property?"

The answer to this question was, "If *Koonj Behary* and *Mudun Mohun* died before a division of the paternal property, the right of *Koonj Behary* was annihilated, in consequence of the partnership, and whoever was his partner is alone entitled to the joint property, and the disputed property was obtained during partnership. Whatever property is acquired during partnership, becomes joint property; the widow of *Koonj Behary* can have no claim to the rights of her husband in such property. Widows are only entitled to maintenance, and an allowance for charity, and other necessary wants." "*Rewun Persad*, who is the partner, is the lawful claimant. This *bewusta* is given agreeably to the *Mitacshara*, *Vira Mitrodaya*, *Smriti Chandrica*, and *Vivada Chintamani*, current in these parts."

"First Authority.—'Doctrine of *Katyayana*, contained in the *Smriti Chandrica*: The widow, on the

death of her husband, is entitled to maintenance, and something for charity, and the supply of other wants necessary to widows.' Second authority.—'Doctrine of the *Rikh*, contained in the *Vivada Chintamani*: To a brother's and son's widow, who keeps undefiled her husband's bed, and is childless, give food and clothing.'"

On receipt, by the *Sudder* Court, of this *bewusta*, that Court deemed it expedient to issue an order to the *Sudder Dewanny* Court of *Calcutta*, for the *Pundit* of that Court to give a *bewusta*, agreeably to the questions, as above-mentioned, and in conformity with the *Sastras* current in *Benares* and *Allahabad*.

In pursuance with this order, the law-officer at the *Sudder Dewanny* Court at *Calcutta*, on the 6th of *March* 1839, gave a *bewusta*, in the terms following:—"Under the circumstances stated in the question, *Mussumat Radha Beeby*, the widow, has a right to the share of *Koonj Behary*, in the estate of *Fakir Chund*, which continued in the possession of *Fakir Chund's* widow till 1833 C. E., under the deed executed by *Fakir Chund*, in the same manner that *Rewun Persad* claimed the share of *Mudun Mohun*, his father; and she will be entitled to the share of *Koonj Behary*, in the estate of *Fakir Chund*, which, during the lifetime of his widow, remained in her possession. The right of both the parties, that is to say, of *Rewun Persad* and *Radha Beeby*, the widow of *Koonj Behary*, in the estate mentioned in the deed of *Fakir Chund* aforesaid, is equal, agreeably to the *Sastras*. If the division of the paternal estate had not taken place between *Koonj Behary*, Plaintiff's husband, and *Mudun Mohun*, father of *Rewun Persad*, as alleged by *Rewun Persad*, even in such case, agreeably to the *Sastras*, *Radha Beeby*, the widow of *Koonj Behary*, would be the proprietor

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and heir, and entitled to the share of *Koonj Behary*, in the disputed property, in consequence of there being no son, son's son, nor son's son's son, of *Koonj Behary*, deceased; because the shares are mentioned in the deed, viz., 'After the death of my widow, whatsoever may remain, one-half shall go to my brother, *Beekhary Das*, and after the death of my said brother, to his sons.' From this language, after the death of *Beekhary Das*, the sons of *Beekhary Das* are understood to be the receivers of a half-share of the property mentioned in the deed of shares. The sons of *Beekhary Das* were only two persons, and there is no word contained in the deed of shares from which it may be understood that the two sons of *Beekhary Das* were to receive unequal shares; consequently, their prospective right was distinct and equal; and after the death of the widow of *Fakir Chund*, the two sons of *Beekhary Das* were clearly pointed out by the *Sastras*. Under these circumstances, notwithstanding the widow of *Fakir Chund* being still living, by reason of the death of *Beekhary Das*, the two sons of *Beekhary Das*, that is to say, *Koonj Behary* and *Mudun Mohun*, became the representatives of their father, and the widow of *Fakir Chund*, being living, on the death of *Koonj Behary* and *Mudun Mohun* also, the heirs of *Koonj Behary* and *Mudun Mohun*, who were living after the death of the widow of *Fakir Chund*, are in like manner entitled, under the *Sastras*, to a half-share of the property mentioned in the deed of shares, that is to say, the heirs of *Koonj Behary* to the proportional share of *Koonj Behary*, and the heirs of *Mudun Mohun* to the proportional share of *Mudun Mohun*. Thus it is evident that *Mussumat Radha Beeby*, the widow of *Koonj Behary*, is entitled under the deed, executed by *Fakir Chund*,

which was executed with the consent of the '*sapindas*,' that is to say, of the brothers and the sons of the brothers of *Fakir Chund*, to the proportional share of *Koonj Behary*, in the disputed property, there being no son, son's son, or son's son's son; and the division of the property mentioned in the deed executed by *Fakir Chund*, and the division of the paternal estate between *Koonj Behary* and *Mudun Mohun*, was not essential; but that the paternal estate had been divided between *Koonj Behary* and *Mudun Mohun* in 1819 C.E., is obvious from the question. This *bewusta* is according to the books of *Menu*, *Mitacshara*, *Vira Mitrodaya*, and other books current in *Benares* and *Allahabad*. First Authority.—' Doctrine of *Menu*, viz., gift, or the cause of proprietary right to the donee.' Second Authority.—' Doctrine of *Nareda Muni*, contained in the *Mitacshara* and other books, viz., gifts are of seven kinds, called "*muneean dutt*," that is to say, incapable of being set aside.' [The *Pundit* here set forth the names and descriptions of the seven gifts.] Third Authority.—' Contained in the *Vira Mitrodaya* and other books, viz., on the occasion of a sale, or gift, or other transaction where there is no specification of the shares of the purchasers or donees, each person among the recipients, purchasers, &c., is presumed to have an equal share.' Fourth Authority.—' Doctrine of *Yajnyawalcya Muni*, contained in the *Mitacshara*, *Vira Mitrodaya*, and other books, viz., if a person die without leaving a son, or a son's son, or a son's son's son, his widow will have the first claim to his estate; after her, the daughter; after her, the daughter's son; after him, the mother; after her, the father; after him, the brothers; after them, the brother's son, and so forth, one after the other, in order of succession.

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Fifth Authority.—'Contained in the *Mitacshara*, viz., if a person leaving no son, son's son, son's son's son, having messed separate from his brethren, and after division, not having re-united with them, shall die, his widow will be entitled to the whole of his estate.' "

The Appeal was heard by Mr. *William Monckton*, one of the Judges of the *Sudder Dewanny Adawlut*, of the North-Western Provinces, held at *Allahabad*, who, on the 8th of *April* 1839, delivered his Judgment, and after stating the circumstances and pleadings in the suit, proceeded in the following terms:—"With reference to the laws of the *Sastras* current in these provinces, it is very clear, that a right in the estate of *Fakir Chund*, deceased, which after his death became the property of *Mussumat Mehtaboo*, his widow, would in no wise have descended, under the *Sastras*, to Appellant, and *Rewun Persad*, after her death, had there been no deed creating the right of the heirs of *Beekhary Das*; but a right of property in the entire estate would, by inheritance, have passed to *Dial Das*: in the suit, however, of *Rewun Persad*, Plaintiff, against *Dial Das*, Defendant, the Plaintiff rested the claim of the heirs of *Beekhary Das* on this very deed, executed by *Fakir Chund*. The Defendant in that suit, moreover, made no objections to the said deed, nor to its being put in force, agreeably to its provisions. The point in dispute simply referred to the intent of the deed. When the case came in appeal before this Court, it was adjudged just and equitable to cause a division of the estate of *Fakir Chund*, so much of it as remained on the death of *Mussumat Mehtaboo*, between the children of *Beekhary Das*, and *Bhowany Persad*, on the strength of the aforesaid deed of division, executed by *Fakir Chund*;

and it was on this view that the *Zillah* decree, as regarded the rejection of the objections of the party, who is Appellant in this case, was modified, and the claim of *Rewun Persad* decreed, for all, except the item of Rs. 12,500, part of the Rs. 25,000, on account of '*sadaburt*;' but, in that suit, the question whether *Rewun Persad* was entitled to the shares of both persons, to wit, of *Mudun Mohun*, his father, and of *Koonj Behary*, his uncle, or only of his father, was not tried, in consequence of this suit, for the share of *Koonj Behary*, being pending at the time. But this point is now fit to be tried in the present suit, as well as this question, to wit, whether the disputed property of this suit, of which neither *Mudun Mohun* nor *Koonj Behary* ever had possession, and, consequently, was never held in coparcenary by them, nor was the division thereof possible, is now to be esteemed divided property or undivided; and whether the share of *Koonj Behary*, which was a component thereof, can descend to his widow, or not? Now, in my opinion, since *Mudun Mohun*, the father of *Rewun Persad*, in his replication, filed in the suit for a house, wherein he was Plaintiff, and *Salik Ram* and *Mussumat Jhukoo*, the widow of *Kishore Chund*, were the Defendants copy of which replication is on the files of the present suit, himself states, that the paternal property had been divided between himself and *Koonj Behary*, without any qualification of the division being partial or entire; the present plea of the Defendant aforesaid, with regard to the whole of the paternal property not having been divided, cannot be received. But, independently of this, the drift of the Defendant cannot be ascertained when he states, that a part of the paternal estate had been divided, and that a part had

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remained undivided; for, in his answer to the plaint, he states that, even supposing the whole of the paternal estate to have been divided, the Plaintiff has no claim to the disputed property, which remained undivided. Here, it is evident, the chief argument of the Defendant is, that the disputed property was undivided; for, had Defendant mentioned the circumstance, that the whole of the paternal estate had not been divided, as affording an argument in his favour, he ought clearly and explicitly to have stated it; but as Defendant has not given any particulars, it is not now necessary to enter into that point. It is very evident that if *Mussumat Mehtaboo* had died before *Mudun Mohun* and *Koonj Behary*, the disputed property would have undergone a division, agreeably to the deed executed by *Fakir Chund*, and that whatever might have come into the possession of *Koonj Behary* would have descended to his widow, after his death, in like manner with the rest of his estate, of which she is now in possession. Under these circumstances, it is not by any means consonant with justice, that Appellant should be kept out of possession of her husband's share, and that *Rewun Persad*, who, agreeably to the *Sastras*, cannot share in the estate of *Mussumat Mehtaboo*, should take the whole of the shares of *Mudun Mohun* and *Koonj Behary*, to which they are entitled agreeably to the deed executed by *Fakir Chund*, for, as Appellant cannot be heir to *Mussumat Mehtaboo* under the *Sastras*, so neither can *Rewun Persad*; and as *Rewun Persad* is the heir of *Mudun Mohun*, his father, and accordingly is considered entitled to receive the share of his father under the deed aforesaid, from the estate of *Mussumat Mehtaboo*, and not as heir to *Mussumat Mehtaboo*; so also the Appellant is the heiress

of her husband, and is entitled to her husband's rights in the said estate; thus, the equality of rights of the Appellant and *Rewun Persad*, in this estate, which descended, under the deed executed by *Fakir Chund*, to *Mudun Mohun* and *Koonj Behary*, is abundantly evident. This Judgment, which is based in equity, is not at all opposed to the *Sastras*, but is supported by the *bewustas*, taken from the *Pundits* of this and the *Sudder* Court of *Calcutta*, in the present case. On these grounds, a decree ought to pass in favour of the claim, and the order of the *Zillah* Court reversed."

The Appeal then came before Mr. *Benjamin Taylor*, another Judge of the *Sudder* Court, who concurred in all respects with the opinion of Mr. *William Monckton*, and passed a final order, that " the claim and appeal of the Appellant be decreed to her against *Rewun Persad* and *Dial Das*; that the decision of the principal *Sudder Amin* of *Zillah Mirzapoor*, dated 14th of *September* 1838, be reversed; that the whole of the costs of the two Courts be awarded against *Rewun Persad*, who is the true Defendant in this suit, and who, having laid claim to the share of *Mudun Mohun* and *Koonj Behary*, in which the Plaintiff of this suit holds a right, as regards the share of *Koonj Behary*, and having obtained a decree, refused to deliver up the rights of Appellant, denying her title to the same; that Appellant, in issuing out execution of the decree of this Court, do recover the subject-matter of the decree obtained by her, with interest on the principal of the ready cash, from the date of the decision of the *Zillah* Court, from *Rewun Persad* and *Dial Das*, in manner following, to wit: If *Rewun Persad*, who is only entitled to a fourth share, shall have realized more than what is his due by virtue of the execu-

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tion of his decree from *Dial Das*, then Plaintiff shall recover to that extent from *Rewun Persad*, and the remainder of the subject-matter of her decree, should there be such remainder, from *Dial Das*; that the costs of suit, together with interest from the dates of the decrees to the date of payment of the same, be awarded her from *Rewun Persad*; that should *Rewun Persad*, by issuing execution of his decree, not have realized to the extent of four anas in the rupee, being his share, he be allowed to execute the said decree against *Dial Das*, to the extent of such proportion as may still remain due to him of the four anas awarded to him; that the Appellant shall possess the same power, in every respect, over the subject-matter of the decree obtained by her, as she possesses over the estate of her husband now in her possession."

From this decree, the Appellant brought the present Appeal.

Mr. *Buller*, Q.C., Mr. *Jackson*, and Mr. *Forsyth*, for the Appellant.

There is no evidence that *Koonj Behary* and *Mudun Mohun* ever ceased to be members of an undivided Hindoo family; or that any complete division of property ever took place between them. The *onus* is upon the Plaintiff to prove that the property claimed by her was separately acquired. Under the terms of the Deed or Will of *Fakir Chund*, the property in dispute was bequeathed to the sons of *Beekhary Das* jointly; and *Mudun Mohun* having survived *Koonj Behary*, the Respondent's deceased husband, the Appellant is entitled to succeed, as his heir. The property of *Fakir Chund* was never divided between *Koonj Behary* and *Mudun Mohun*. No previous act of division could be

held to extend to property in expectancy, which was not reduced into possession during *Koonj Behary's* lifetime. The property given by *Fakir Chund* to *Beekhary Das*, and after him to his sons, at the death of his widow, the tenant for life, must be considered as being held in coparcenary. 1 *Strange's* Hindoo Law (2nd edit.), 233, 195. 2 *Strange's* Hindoo Law (2nd edit.), 321, 338. Secondly, by the Hindoo law, a widow can only take such property as has been reduced by her husband into possession, during his lifetime. *Mussummaut Ayabutee* v. *Rajkishen Sahoo and others* (*a*). *Ramkoonwur* v. *Ummur* (*b*). *Pranshunkur* v. *Prankoonwur* (*c*). 1 *F. Macnaghten's* Cons. on Hindoo Law, 1. 2 *W. Macnaghten's* Prin. of Hindoo Law, 104. A widow of a son who died before his father, is entitled to maintenance only. *Rai Sham Bullubh* v. *Prankishen Ghose* (*d*). 2 *W. Macnaghten's* Prin. of Hindoo Law, 104, 106, 107. The Appellant is the heir to *Koonj Behary* and *Mudun Mohun*, and entitled to the whole property in dispute.

Mr. *Wigram*, Q.C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent.

We submit that *Koonj Behary* and *Mudun Mohun* were divided brothers, and had, after the partition of the paternal estate, separate and distinct interests. This fact is established by the admission of the Appellant's father, through whom he claims. The property in question accrued to their heirs, by virtue of the gift contained in the Will, or testamentary deed, of *Fakir Chund*, which took effect after the brothers

(*a*) 3 Ben. Sud. Dew. Rep., 28. (*b*) 1 Borr. Bom. Rep., 415.
(*c*) 1 Borr. Bom. Rep., 427. (*d*) 3 Ben. Sud. Dew. Rep., 33.

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separated.—[Lord *Brougham*: Can a Hindoo make a Will?]—In the sense we entertain of a Will, it is doubtful: in *Baboo Janokey Doss* v. *Bindabun Doss* (*a*), that point was raised, but the decision of your Lordships went upon a collateral point; there were not the necessary parties to a suit, for the administration of the estate. This is a gift by testamentary deed, to which all the family were consenting parties, and such an instrument is recognised by the Hindoo law. 1 *Strange's* Hindoo Law (2nd edit.), 169. The property never became the common property of the two brothers, because it did not come into possession during the coparcenary of the family. Even if they had not been divided, one brother could not have been heir to the other, in respect of this property, for by the Hindoo law, gifts given to one, of an undivided family, do not fall into the common stock. A gift is considered as separately acquired property. *Mitacshara*, chap. i. sec. iv., plac. 1, 2. 3 *Coleb.* Dig., p. 333. 1 *Strange's* Hindoo Law (2nd edit.), 215.

The Appellant's principal argument is, that this was a transmissible executory interest, which did not accrue till after *Koonj Behary's* death; that his brother, *Mudun Mohun*, took by survivorship, and that the Respondent's title, as widow of *Koonj Behary*, to this share, could not be entertained, as it had not been reduced into possession, during his lifetime. No principles applicable to a bequest of this nature can be found in the books of Hindoo law; it will be necessary, therefore, to refer to the English law, to elucidate this case. It cannot be doubted, that a legacy lapses, after the death of the legatee, in the lifetime of the

(*a*) 3 Moore's Ind. App. Cases, 175.

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testator. *Rose* v. *Rose* (*a*), and cases of that class; but that is widely different from a contingent gift, like the present. The doctrine of survivorship does not attach upon a substituted expectant interest. *Stokes* v. *Holden* (*b*). The brothers did not take under this testamentary deed, as co-partners, in the character of joint tenants, but as strangers, and as tenants in common, and the Respondent, as the widow of *Koonj Behary*, was entitled by the Hindoo law, in force in *Benares* and *Allahabad*, to succeed as heiress, to the share of the gift made to her husband and *Mudun Mohun*, by *Fakir Chund*.

The Right Hon. Dr. LUSHINGTON:

19th Feb. 1847.

For the purpose of showing distinctly what are the questions of law, and matters of fact, in dispute, in this Appeal, it will be expedient to state, in the first instance, the circumstances respecting which there is no dispute.

Fakir Chund died in the year 1814, and for the present we will call him the testator in this cause. He, in *March* 1814, executed an instrument intended to regulate the disposition of his property, after his death.

Fakir Chund, the testator, was one of three brothers. His elder brother was *Bhowany Persad*, who is stated to have divided from his family, which was originally an undivided Hindoo family. He left two sons, *Dial Das* and *Goonee Lal*. The date of the death of *Bhowany Persad* is not stated, but it was before the month of *March* 1814. *Beekhary Das* was the youngest brother, and he died in 1817. He had three sons,

(*a*) 17 Ves. 351. (*b*) 1 Keene, 145.

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the eldest, *Koonj Behary*, died in 1825, leaving a widow, *Radha Beeby*, the Respondent in this Appeal, but no male issue. *Mudun Mohun*, the second son, died in 1829, and he left a son, *Rewun Persad*, who is the present Appellant. The third son died young, and there is no interest derived through him concerned in this litigation.

The property in dispute was the property of *Fakir Chund*, and all parties agree that the instrument which he executed in *March* 1814, in triplicate, is a valid and operative instrument, and to be carried into effect.

To that instrument were appended the signatures of his brother, *Beekhary Das*, and his nephew, *Dial Das*, and *Goonee Lal*, the sons of the elder brother, *Bhowany Persad*, and the signatures of his nephew *Koonj Behary*, and *Mudun Mohun*, the sons of *Beekhary Das*.

Pursuant to the terms of that instrument, on the death of *Fakir Chund*, in 1814, his widow, *Mehtaboo*, succeeded to the possession and enjoyment of his property. She died in 1833, and then a litigation arose as to who were entitled, and in what shares, to take the property of the testator, subject to certain bequests, in the instrument before mentioned. It is not necessary to state the details of this litigation. In the result, *Dial Das* took, under the decree of the Court, one moiety, and *Rewun Persad* was put into possession of the other moiety, but not so as to preclude any claim which *Radha Beeby*, the widow of *Koonj Behary*, might have to a share thereof.

Accordingly, she commenced a suit, to recover a fourth share of the estate, left by *Fakir Chund*, and for that purpose filed her plaint on the 1st of *June* 1835, in the *Zillah* Court of *Mirzapore*. *Dial Das* compromised with the Plaintiff, the present Respondent; and

Rewun Persad, in effect, became the only Defendant, and is now the Appellant. In short, the only question now to be determined is, whether the Respondent, as heir to her husband, *Koonj Behary*, is entitled to recover from the Appellant, *Rewun Persad*, one half of the moiety of the estate of *Fakir Chund*, which *Rewun Persad* is now in possession of.

After various proceedings, which it does not appear necessary to discuss; on the 29th of *November* 1837, the Judge of the *Zillah* Court, Mr. *Thomas*, pronounced a decree against the Plaintiff. From this decree, the then Plaintiff appealed to the *Sudder Dewanny Adawlut* at *Allahabad*, and on the 14th of *March* 1838 the Judges of that Court, Mr. *Turnbull* and Mr. *Monckton*, reversed the decree of the *Zillah* Judge, and remitted the case back to be re-tried; being of opinion, that the questions to be decided had not been properly investigated.

Accordingly, the *Zillah* Court again entered upon the consideration of the case, and, amongst other things, directed to be done by the decree of the *Sudder Dewanny Adawlut*, obtained the *bewusta* of the *Pundit* of the *Zillah* Court of *Allahabad*. The decree was pronounced by the *Sudder Amin*, a native Judge, on the 14th of *September* 1838, and he dismissed the suit of the Defendant, the present Respondent, with costs.

An Appeal against this decree was prosecuted to the *Sudder Dewanny Adawlut* at *Allahabad*, and both agreed upon a joint case, to be submitted for the *bewusta* of the *Pundit* of the Court, each party stating the facts upon which they differed, separately. By order of the Court, the opinion of the *Pundit* of the *Sudder Adawlut*

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at *Calcutta* was subsequently obtained. Mr. *Monckton*, one of the Judges of the Appellate Court, on the 8th of *April* 1839, pronounced his opinion in favour of the Respondent, and that the decree of the *Zillah* Court ought to be reversed. The papers in the cause having been submitted to the consideration of Mr. *Taylor*, another Judge of the same Court, his opinion agreed with that of Mr. *Monckton*, and, accordingly, on the 29th of *April* 1839, a decree was pronounced, reversing the decree of the *Zillah* Court, dated the 14th of *September* 1838, in effect declaring that the Respondent was entitled to recover one fourth of the estate left by *Fakir Chund*; that the present Appellant should pay to her as much as he had received, beyond a fourth share of the said estate, and that *Dial Das* should, if there was any deficiency, make good the same.

From this decree, *Rewun Persad* has appealed to Her Majesty in Council; and the question is, whether he ought, according to the law prevailing as to Hindoo families, in the district where the parties lived, to refund to the Respondent so much of the estate of *Fakir Chund* as exceeds one fourth thereof.

There are certain facts not in contest in this cause. All the parties agree, that the Will or Deed of *Fakir Chund*, whichever it may be called, is an operative instrument. That one moiety of his estate on the death of his widow, *Mehtaboo*, became the property of the family of *Bhowany Persad*; and that one fourth of the property belongs to the Appellant, *Rewun Persad*, through his father, *Mudun Mohun*, who died before *Mehtaboo*, viz., in 1829. Neither is it denied that the remaining fourth share became part of the estate

of *Koonj Behary*, who died in 1825, in the same manner as the one fourth became part of the property of *Mudun Mohun*, assuming it to have vested in either, during their lives.

Again, it is admitted that, according to the Hindoo Law of Succession, *Radha Beeby*, the Respondent, became heir-at-law to the divided estate of *Koonj Behary*, he having died without male issue.

Radha Beeby, the Respondent, being entitled to the estate, generally, of *Koonj Behary*, she is entitled to this one fourth of the property of *Fakir Chund*, if it is to become a part of the estate of *Koonj Behary*, unless by the Hindoo law there is some exception, arising either from particular facts creating it, or from the nature of the property.

The Appellant alleges, and alleges truly, that the Respondent cannot recover from him the property of which he is in possession, unless she proves her title. She asserts that she, as the heir, is entitled to the whole, unless there be a special exception. The Appellants allege two grounds of exception.

First: That *Koonj Behary* and *Mudun Mohun* were two undivided brothers, and that this share of *Fakir Chund's* estate was undivided; that by the Hindoo law, therefore, the widow cannot claim it though she be heir.

Secondly: The Appellant alleges, that this property never was in possession of *Koonj Behary*; that, by the Hindoo law, the widow, though his heir, cannot claim property not in possession of the deceased husband; and that, for this reason, her claim must fail.

Now, as to the first ground of defence, the law is not disputed. It is not denied that a widow cannot

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claim an undivided property. The decision of this question, therefore, turns upon a matter of fact, namely, whether *Koonj Behary* and *Mudun Mohun* were divided brothers or not.

We think, that it may be admitted that the *primâ facie* presumption, where there are no circumstances to affect it, is, that every Hindoo family of this class was an undivided family, and, consequently, this presumption must prevail, unless the circumstances of this case lead to a contrary conclusion. We must, therefore, consider the circumstances, having, however, first directed our attention to some points of Hindoo law, which may have a bearing upon the conclusion to be drawn from the facts.

First: We apprehend it to be undisputed, that a division may be effected without instrument in writing. Secondly: That a division may be either total or partial. Thirdly: That a separation from commensality does not, as a necessary consequence, effect a division, or, at least, of the whole undivided property.

The Respondent alleged in her plaint, that, in the years 1818, 1819, and 1820, a separation took place between *Koonj Behary* and *Mudun Mohun*, when the one half share of the estate of *Beekhary Das* was equally divided between them; that they came to a mutual settlement; and separating, each established a distinct concern for himself.

Beekhary Das died in 1817, and by the instrument of *March* 1814, called the Will of *Fakir Chund*, a moiety of his property, on the death of his widow, is given in these words: "Let my brother, *Beekhary Das* aforesaid, and, after the death of my said brother, his sons, take one half."

Now, we conceive that *Beekhary Das*, having died in 1817, in the lifetime of the widow, the tenant for life, and his sons surviving him, this moiety was not a part of his estate, and that, therefore, *primâ facie*, it could not be divided as a part of the estate of *Beekhary Das*.

But perhaps, as these pleadings are not expressed with much accuracy, it may be that, by one half share of the estate of *Beekhary Das*, was meant the moiety of the estate of *Fakir Chund*, which would have come to him, had he survived *Mehtaboo*, the tenant for life. Now assuming this to have been intended to have been expressed by the plaint, still such half share could not, *de facto*, have been divided between them, for the widow had still the enjoyment of the whole. But the plaint may perhaps mean to aver, that there was an agreement between the two brothers, that the one half share of *Fakir Chund's* property, which would have devolved on *Beekhary Das*, had he survived *Mehtaboo*, should be divided, as far as was then possible, *de facto*; and in support of this understanding of the purport of the agreement, the entries said to have been made in the books, of various concerns, might be evidence, provided they had reference to the property of *Fakir Chund*.

Before, however, prosecuting this inquiry further, it may be expedient to examine what has been done in the Court below, and to ascertain, as far as we can, on which side the weight of authority preponderates. So far as the decision of this case may be affected by the weight of authority, in the Courts of *India*, it stands thus:—In the *Zillah* Court of *Allahabad*, the *Pundit* of that Court was consulted. His opinion, shortly put, is to the following effect: That if there has been a se-

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paration between two brothers, the widow of one becoming his heir, may cause the separation of any portion of the estate which may remain, *de facto*, undivided; that this doctrine does not apply to the estate of the uncle of her husband, when the estate of the husband's father only had been divided, such estate not having come into her husband's possession before his death.

It is difficult to deal with an opinion, such as this, with reference to the question we have to solve. If the property now sued for, was a part of the estate of *Koonj Behary*, at the time of his death, then, according to the first part of the opinion of this *Pundit*, the widow's claim would be valid. But if it formed no part of the estate of *Koonj Behary*, and if the division was confined to the estate of the husband's father, then the widow would not be entitled, because the property never was in the husband's possession.

We think that the opinion of this *Pundit* renders very little assistance to the solution of the difficulties arising in this case. For first, this *Pundit* is silent, as to whether this property ever was part of the estate of *Koonj Behary*, or not. Secondly, he assumes that the only property divided, was that which came from *Koonj Behary's* father. And thirdly, he omits all mention of the Will or Deed of 1814.

The Judgment of the principal *Sudder Amin* throws no further light upon the matter, for he merely recites the *bewusta*, and rejects the widow's claim, without attempting to show how the *bewusta* applied to it.

The opinion of the *Pundit* of the *Sudder Adawlut* of *Allahabad* was taken, on a case submitted by both parties. This answer is partly in favour of the widow's

claim. He considers that *Mudun Mohun* had no claim to the disputed property at all, because it never came into possession until after the two brothers had separated, and was never held in coparcenary by them, and that, therefore, *Rewun Persad*, as the son of *Mudun Mohun*, has no claim at all to it. He considers the disputed property, as undivided property; but if a part of the estate of *Fakir Chund*, that neither of the present parties could claim by inheritance, but that both are entitled, under the Will or Deed. He affirms, that the heirs of *Mudun Mohun* and *Koonj Behary* derive their only title from the deed. The answer, however, to the third question put to him, would seem to place the right of the widow entirely on the question, whether a division of the paternal property of *Beekhary Das* had taken place, before the death of *Koonj Behary* and *Mudun Mohun*.

It it not easy to reconcile these two opinions.

The *Pundit* of the *Sudder Adawlut* of *Calcutta* gave in his *bewusta*. This opinion supports the claim of the widow, whether there had or had not been a division of *Beekhary Das's* estate, between his two sons.

Upon a careful consideration of this opinion, and the authorities cited in support of it, the grounds of it would seem to be, that the widow is the heir of *Koonj Behary*, and that she is, in such character, entitled to all his property, which was not held in coparcenary with his brother; that the disputed property passed by the deed of 1814, which was signed by both *Koonj Behary* and *Mudun Mohun*, to them in moieties, on the death of their father; that by force of the deed, it was divided into moieties, and taken by them or their heirs; no separate or divided property coming by gift from *Fakir Chund*.

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The decision of Mr. *Monckton*, the Judge of the *Sudder Adawlut* of *Allahabad*, before whom the cause first came, is in favour of the widow. He appears to be of opinion, that the disputed property was in every point of view divided property. That a complete division took place between the two brothers, and that had *Mehtaboo* died in their lifetime, this property would have been divided between them, agreeably to the deed, and that *Koonj Behary's* share would have descended to the widow, as his heir, and must consequently do so now. In this opinion, Mr. *Taylor*, another Judge of the same Court, concurred.

The true question then before us, is, whether we are convinced by the arguments of the Appellant, that this decision is erroneous; for if not so convinced, it must be affirmed.

We find it impossible to reconcile the whole of the reasonings of the *Pundits* and of the Court together, and to render them entirely consistent. The conclusions in the main agree, but the reasons assigned do not do so altogether.

We think, on a consideration of all the circumstances, that a complete division of all the property of *Beekhary Das*, which was held in coparcenary, was agreed upon between the brothers, and we think so from a consideration of these papers.

First, such division is very distinctly alleged in the plaint. In the petition of *Rewun Persad*, which is an answer to the plaint, a separation of commensality is admitted, though a division as to the property is denied.

In the supplementary plaint, the division is again pleaded, with this addition, that what could not be immediately realized remained in coparcenary, till a reali-

zation could take place, as loans and debts due to the joint concerns, and the property coming under the deed, possessed by *Mehtaboo* during her life.

The answer of *Rewun Persad* admits a division, but denies it to be complete, now stating, however, what were the limitations, and then seeks to avoid the effect of a division, by alleging, that no division could effect the property during the lifetime of *Mehtaboo*, it being during that time in joint partnership.

The Respondent re-asserts the division, and alleges that the disputed property stood on the same footing, as the balances due on accounts in joint partnership, to be divided as they accrued.

The rejoinder raises this distinction, that the division of the outstanding debts was subject to no contingency, *Beekhary Das* being dead, and that the disputed property was subject to the life estate of *Mehtaboo*.

So stands the case upon the pleadings. A division is admitted, and no particular exception alleged. The objection of *Rewun Persad* is, not that there was a special exception of the disputed property, but that, from the nature of the property, it was necessarily excepted.

We do not think that there is anything in the nature of the disputed property which should except it from a general division. It is not contended that there are any peculiar rules of construction in *India*, applicable to the instrument called a Will or Deed. The testator, after the death of his widow, gives his property to his brother, *Beekhary Das*. On his death, it becomes divisible into two parts, one moiety to the sons of *Beekhary Das*. We apprehend that they would take as tenants in common; in fact, that they had each of them

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a vested interest in one fourth share, not to come into actual enjoyment till the death of the widow. But here was no contingency, as contended for by the Appellant. The only uncertainty was the period of enjoyment.

If however the Will could be construed, so as to read the bequest to the brothers as a joint tenancy, even in that case we do not see anything against reason why they should not agree to divide the property in severalty, when the period of enjoyment occurred.

We are inclined indeed to the opinion, that this property was not property the subject of any division at all, but that the division was effected by the Deed or Will, and that each brother took one fourth as a divided property.

But to look to the evidence in the *Zillah* Court, as to a division. It is not of a definite kind, nor are we quite certain how far the Court below make use of it. The *vakeel* of the widow, in his deposition, declares that he has a *chitta* written by *Mudun Mohun* to *Koonj Behary*, undertaking to produce the deed of *Fakir Chund*, and a deed of sale whereon is endorsed a sale by *Mudun Mohun* of his share to *Koonj Behary*.

Now supposing those documents genuine, the utmost effect which can be given to them is, that *Mudun Mohun*, through whom *Rewun Persad* claims, acknowledged some interest in the Deed or Will of *Fakir Chund*, to belong to *Koonj Behary*; and as to the sale of the part share of the house, that possibly it may be inferred from it that it was a part execution of an agreed division.

Some documentary evidence was produced, consisting of proceedings in suits between other persons to show the law. Those we think do not require comment. They are produced only for the purpose of introducing the *bewustas* of *Pundits*, on what is assumed to be a similar question of Hindoo law. But in fact, they are not similar in many essential particulars.

The same observation applies to the *bewusta* produced on behalf of the Appellant, *Rewun Persad*: it does not govern this case, nor do the proceedings in the other suits apply here.

In the *Sudder Adawlut*, however, much more important evidence was produced, viz. the proceedings in an action brought by *Mudun Mohun*, in 1825. In that suit, *Mudun Mohun* pleaded the division of the paternal estate, and the separation from his brother *Koonj Behary*.

We think that this averment by *Mudun Mohun*, which was supported by evidence, is strong proof against *Rewun Persad*, who claims through him, that a division and separation had taken place; and further, that it was a complete and entire division, for no limitation is alleged.

And herein we agree with Mr. *Monckton*, that the fact of *Rewun Persad* not having specified any exceptions to the partition, being of the whole of the paternal property, is evidence that there were no exceptions.

We think that upon a consideration of these premises, we are justified in concluding, if such conclusion be necessary for the decision of this case, that a complete division and separation did take place between *Koonj Behary* and *Mudun Mohun*.

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It will be well here to notice another argument, which was strongly pressed on behalf of the Appellant. It was said that the widow, as heir, could not claim any property of her husband, which was not in possession, at the time of his death; that the disputed property was at that period, and for years afterwards, in the possession of *Mehtaboo*, and that, consequently, *Radha Beeby* could have no claim to it.

The first observation that strikes us as to this argument, is, that it was never distinctly urged in the Courts below, though it is true that the *Pundit* of the *Zillah* Court of *Allahabad* makes it the principal foundation of his opinion.

There is not the least reference to it in the opinion of the *Pundit* of the *Sudder Adawlut* of *Allahabad*, in that of the *Pundit* of the *Sudder Adawlut* of *Calcutta*, nor in the Judgment of Mr. *Monckton*, in which Mr. *Taylor* concurred. We think that it would be impossible, under circumstances, for us to reverse the decree of the Court below on that ground. Indeed, this averment of the law is not even one of the grounds of appeal.

We have no intention whatever to disturb the doctrine of the Hindoo law, that a widow, succeeding as heir to her husband, cannot recover property not in possession of her husband. But we think that it has not been shown, in this case, that the disputed property was not in possession, according to the meaning of that term in the Hindoo law, nor that the doctrine applies to a property, where the husband had a vested interest, under a Will or Deed, and of the actual enjoyment thereof, postponed during the lifetime of another.

We proceed, then, to determine this case, on the assumption, that there was a complete division between the two brothers; that the law as to possession by the husband does not, under the existing circumstances, bar the widow's claim.

Now if this be so, we think that the Judgment of the Court below must be affirmed, in every view of the case. It is admitted on all hands, that *Radha Beeby* is the heir of *Koonj Behary*, and that she is entitled, as such, to all the property which was not held in coparcenary with *Mudun Mohun*. The disputed property was derived from *Fakir Chund*, and whatever rights *Beekhary Das* had in it, are founded upon this Deed or Will. The same observation applies to any rights which belonged to *Koonj Behary* and *Mudun Mohun*. If the disputed property be deemed to be property given or bequeathed to *Koonj Behary* and *Mudun Mohun*, by the Deed or Will, then we think that it was divided property, and never held by them in coparcenary; but in that view, the widow is entitled, as the heir, to the divided property of *Koonj Behary*.

If the property be considered as the property of *Beekhary Das*, a supposition very difficult to be made, then we think, that if, on his death, it was held in coparcenary by the two brothers, it was divided, and became separate by the division made between the two brothers.

We do not think that this property was bequeathed to the two brothers, as joint tenants. But even if it were, we should incline to the opinion that the division extended to it. We, therefore, come to the conclusion, that either the disputed property was never held in joint tenancy, or that, if so held, it was divided, and

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consequently we affirm the Judgment, on the grounds taken by the *Pundits* in the *Sudder Adawlut*, and adopted by the two Judges of that Court; and it must be affirmed, with costs.

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CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

ROBERT WIGRAM CRAWFORD - - *Appellant*,

AND

RICHARD SPOONER - - - - *Respondent*.*

On Appeal from the Supreme Court at Bombay.

11th & 15th Dec. 1846.

A ship built in a foreign port in *India*, in 1817, within the limits of the Company's Charter, by foreigners, and which sailed under foreign flags, until 1838, when it was then and thereafter owned by, and belonged to, British subjects, resident at *Bombay*, is entitled, under the Proclamation of the Governor General in Council, and the Act of the Legislative Council of *India*, No. X. of 1841, (passed in pursuance of the powers granted by the Statute, 3 & 4 *Vict.*, c. 56,) to be registered at *Bombay*, as a British ship, for the purposes of trade, within the limits of the Company's Charter.

THIS was an action on the case, brought by the Appellant, (the owner, to the extent of eight sixty-fourth parts, of a vessel, called the "*General Wood*,") against the Respondent, the registering officer of ships, at the port of *Bombay*, appointed under the Act of the Legislative Council, No. X. of 1841; for refusal to register the ship, at that port. To the declaration, the Respondent pleaded. that the ship was not, on the 11th of *September* 1844 (the day named in the declaration, when the refusal was made), or before, had not been, or was then, entitled to the privileges of, or to

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir E. East, Bart., and Sir E. Ryan, Knt.

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be registered as, a British ship; and thereupon issue was joined. It was afterwards agreed between the parties that the following special case should be stated for the opinion of the Court.

"In the year 1816, a ship was laid down, and in 1817, was completed and built at *Damaun*, a Portuguese settlement in *India*, within the limits of the Company's Charter (as those limits are defined by the 3 & 4 *Vict.*, c. 56), for and as the property of one *Manoel Pereira*, a Portuguese subject, and resident at *Macao*, who continued to own the ship, and navigate her, under the flag of *Portugal*, until the year 1824, when he sold and assigned the ship to one *John Hudson*, British subject, a master mariner resident at *Calcutta*.

"*John Hudson* owned the ship, and navigated her under the British flag, until 1826, when he sold and transferred her to *Francis Mendez*, Portuguese, a merchant of *Calcutta*, who, in 1827, transferred her to *Antonio Pereira*, also a merchant of *Calcutta*. The vessel was shortly afterwards transferred to subjects of *Portugal*, at *Macao*, and, in 1832, was transferred by them to *John Burd*, a master mariner, resident at *Singapore*, but a subject of *Denmark*.

"In 1833, *John Burd* had the vessel registered as a Danish ship at *Altona*, and, in 1838, he sold and transferred her to Mr. *Henderson*, a British subject and merchant, then resident at *Bombay*, by whom the ship was, in 1838, sold and transferred to Messrs. *Jardine*, *Matheson* and Co., British subjects, and merchants of *Canton*, in *China*, by whom the ship was, in the same year, re-transferred to *John Burd*.

"In 1841, *John Burd* sold and transferred the ship back to Messrs. *Jardine*, *Matheson* and Co., who, in the present year, sold and transferred the ship to Sir

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Jamsetjee Jeejeebhoy, Sons and Co., British subjects and merchants, resident and carrying on business in *Bombay*, and who had since sold eight sixty-fourth parts or shares in the ship, to the Plaintiff in this action, a British subject, residing in *Bombay*.

"The ship was navigated under Danish colours whilst owned by *John Burd*; but on being transferred to Mr. *Henderson*, a pass was granted by the Master Attendant at *Bombay*, under the provisions of Act No. XIX. of 1838, of the Legislative Council of *India*, entitled, 'An Act for prescribing the rules to be observed, in order that ships or vessels belonging to ports within the territories under the Government of the East India Company, or belonging to Native Princes or States, or their subjects, might become entitled to the privileges of British ships, under a Proclamation of the Governor-General in Council, in *India*, made in pursuance of the Statute, 3 & 4 *Vict.*, c. 56.' The ship was navigated under British colours, and it was transferred back to *John Burd*, when it was again navigated under Danish colours, and on being transferred to Messrs. *Jardine*, *Matheson* and Co., a sailing letter of licence was granted to them by Sir *Henry Pottinger*, the chief superintendent of the trade of British subjects in *China*, under which the ship sailed with British colours.

"The name of the vessel has been several times changed, and it is now the '*General Wood.*'

"The survey required by section vii. of the Act of the Legislative Council of *India*, No. X. of 1841, has been duly made by the Government officers, and the Plaintiffs, and other part owners, have also made to the registering officer the declaration contained in section v. of the Act, and all the requisites of that Act have

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been complied with; but the Defendant, as the Registrar of Shipping for the port of *Bombay*, refused to register her, under Act No. X. of 1841, or to grant her a certificate of registry, for the purposes of trade, within the limits of the Company's Charter, on the following grounds:—First. That the vessel has been sold to foreigners. Second. That she has sailed under foreign flags and under foreign names. Third. That at the time of the passing of the Act X. of 1841, she was not sailing under a pass, within the meaning of the said Act. The Plaintiff, on the other hand, contends that the ship having been built within the limits of the Company's Charter, as those limits are defined by the Statute, 3 & 4 *Vict.*, c. 56, and being exclusively owned by Her Majesty's subjects, for whom the Governor-General in Council has power to legislate, is entitled to registry at the port of *Bombay*, under the Act of the Legislative Council, No. X. of 1841, for the purpose of obtaining the benefit of the Proclamation of the Governor-General in Council, annexed to the said Act; and that inasmuch as nothing is contained in the Act, excepting or tending to except, from the operation and benefit thereof, vessels which had at any time previously belonged to persons not subjects of Her Majesty, for whom the Governor-General in Council has power to legislate, the defendant cannot lawfully refuse to register the vessel in question, under the Act and Proclamation, by reason of her having been formerly owned by subjects of a foreign state.

"The question for the opinion of the Court is, whether the Plaintiff, and the other owners of the ship, are lawfully entitled to have the ship registered, under the provisions of the Act of the Legislative Council of *India*, No. X. of 1841, and the Proclamation annexed thereto.

"It is agreed that all documents referred to in this case may be referred to fully on the argument.

"If the Court should decide in favour of the registry, a verdict is to be entered for the Plaintiff, with nominal damages, the Defendant undertaking to register the vessel accordingly; and if in the negative, a verdict is to be entered for the Defendant, with costs, either party to be at liberty to appeal; and should, pending the appeal, the vessel be registered, and allowed to sail and trade under the register, in the event of the decision of the Appeal Court being against the Plaintiff, then the registry of the vessel shall be delivered up to be cancelled."

The special case was argued on the 21st of *September* 1844, before the Supreme Court, consisting of the Chief Justice, Sir *Henry Roper*, and Sir *Erskine Perry*, and the Court gave an interlocutory judgment, in the nature of a verdict, in favour of the Respondent.

Judgment was afterwards signed for the Respondent, and from this Judgment, the Appellant brought this appeal, which now came on for argument.

Mr. Serjeant *Channell*, and Sir *John Bayley*, for the Appellant.

The ship "*General Wood*" having been built within the limits of the Company's Charter, and owned by British subjects at *Bombay*, at the time of the issuing of the Proclamation and passing of the Act of the Legislature of *India*, No. X. of 1841, the Appellant was entitled to have it registered at the port of *Bombay*, and a certificate of registry granted to him; as a British ship, for all the purposes of trade, within the limits of the Company's Charter. We do not dispute that the English Registry Acts, or that most of the

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provisions of the maritime code may have formerly applied to *India*; what we contend now is, that the 3 & 4 *Vict.*, c. 56, enabled the Governor-General to extend to a new class of ships, the privilege of British registry; and that having satisfied the terms of the Proclamation and Act of the Legislature of *India*, the English Ship Registry Acts had ceased to have application to ships or vessels built within the limits of the Company's Charter, which were British owned at the time of the issuing of that Proclamation. It was no necessary ingredient in the title of a British ship, to registry that her ownership should have been continuously British from the time of her build, until the time of the application for her registry. Nor did it make any difference, under the 3 & 4 *Vict.*, c. 56, that the vessel had been previously owned by a foreigner. The policy of the law applicable to ships of this class is disclosed in the Act 55 *Geo.* III., c. 116, and confirmed by re-enactment after repeal, by the Act, 3 & 4 *Vict.*, c. 56; it is favourable to the exclusion of the condition of continuous British ownership, imposed temporarily on East Indian shipping. The Act, 55 *Geo.* III., c. 116, having declared exemption from the English Registry Acts, in favour of all ships built before the 1st *January* 1816, in ports within the limits of the Company's Charter, and the Act, 3 & 4 *Will.* IV., c. 59, having restricted that exemption to ships continuously British owned, the Act, 3 & 4 *Vict.*, c. 56, in a more liberal policy, repealed the restriction, re-enacted the privileges to their former extent, and permitted the Governor-General in Council to confer privileges of equal degree on ships built after the 1st *January* 1816, as ships theretofore built or then building. The provisions requiring continual British

ownership were expressly repealed by the Act, 3 & 4 *Vict.*, c. 56. The intention of the Legislature was to exclude that provision of the General Registry Act, and to give power to the Governor-General in Council, to confer analogous privileges on ships built after the 1st *January* 1816.

Mr. *Wigram*, Q.C., and Mr. *Forsyth*, for the Respondent.

It is a general rule, that the Registry and Navigation Acts must be construed with reference to the maritime code at large. The argument of the Appellant, that you are to look to the 3 & 4 *Vict.*, c. 56, and the Act of the Legislative Council of *India*, No. X. of 1841, alone, cannot prevail. These Acts are in *pari materia* with the code, being applicable to the same subject. The same construction was put upon the Legacy Duty Acts. *In the matter of Cholmondeley* (*a*). It cannot be doubted, that the Registry and Navigation Acts extend to *India*. *Stringer* v. *Murray* (*b*). *The Recovery* (*c*), though it was doubtful at one time. *Wilson* v. *Marryat* (*d*). The 3 & 4 *Vict.*, c. 56, sec. 3, declares, that it shall be lawful for the Governor-General in Council, in *India*, by Proclamation, to declare ships built within the limits of the Company's Charter, to be British ships, for the purposes of trade, within the limits of the Charter. This Act of Parliament, however, gave no power to the Governor-General in Council to abrogate or restrict that part of the Registry Laws which disqualified a vessel which had been once owned by a foreigner, from being registered as a British ship. It cannot be taken as a repeal of the former Acts: it is

(*a*) 1 Crom. & Mee. 149.
(*b*) 2 Bar. & Ald. 248.
(*c*) 6 Rob. Adm. Rep. 341, 346.
(*d*) 1 Bos & Pul. 430.

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in the affirmative only, and cannot be a repeal of those Acts, unless there be negative words, or a plain contrariety between the two Acts. *Middleton* v. *Crofts* (*a*). There is no indication of an intention in the 3 & 4 *Vict.*, c. 56, to repeal the 6 *Geo.* IV., c. 110, and 3 & 4 *Will.* IV., c. 55, which required continuous ownership. In *Dore* v. *Grey* (*b*), Mr. Justice *Ashurst* held that the bare recital of a Statute, without a clause of repeal, was not sufficient to repeal the positive provisions of a former Statute. Even if this vessel had been a *London* built ship, unless she had been continuously owned by British subjects, she could not have the privileges of a British ship; 3 & 4 *Will.* IV., c. 59, sec. 84. The words in the Act, 3 & 4 *Vict.*, c. 56, being owned, is to be construed by the general Registry Laws; and by those laws, continuous ownership is required, to entitle a vessel to be registered as a British ship. There is another objection, this vessel has been sold to foreigners. By the general Registry and Navigation Laws, a ship that has been sold to a foreigner is henceforward disqualified from having the advantages of a British ship. The Act X. of 1841, according to its just interpretation, does not authorise the registration of a vessel built previously in a foreign port, by and for a foreigner.

Mr. Serjeant *Channell*, in reply.

The rule is, in construing an Act of Parliament, to take the words in the sense the Legislature has used them, and they are to have that effect, unless the construction of those words is either by the preamble, or by the context of the words, controlled or altered. There can be no doubt here, that the Legislature, in

(*a*) 2 Atk. 675, S. C. Cas. temp. Hardw. 57.
(*b*) 2 Term Rep. 365.

using the words, being owned, in the 3 & 4 *Vict.*, c. 56, meant them to meet such a case as the present. The words "which shall wholly belong," "continue wholly to belong," and which imply a continuous ownership, are limited in their application to the immediate context, viz., ships condemned either as prize of war, or forfeited for a breach of the Slave Trade Abolition Act.

Lord BROUGHAM:

Their Lordships are clearly of opinion, that the Judgment of the Court of *Bombay* cannot stand. The construction of the Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the Legislature; we cannot aid the Legislature's defective phrasing of the Statute; we cannot add, and mend, and, by construction, make up deficiencies which are left there. If the Legislature did intend that which it has not expressed clearly; much more, if the Legislature intended something very different; if the Legislature intended something pretty nearly the opposite of what is said, it is not for Judges to invent something which they do not meet with in the words of the text (aiding their construction of the text always, of course, by the context); it is not for them so to supply a meaning, for, in reality, it would be supplying it: the true way in these cases is, to take the words as the Legislature have given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered; and, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply that meaning, and

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supply the defect in the previous Act. We lean very much to construing these words in the way which has been pointed out by the learned Serjeant in his reply, that these words, which import continuous ownership, are limited in their application to the immediate context, namely, ships condemned, either as prize of war, or forfeited and condemned as forfeited for a breach of the Slave Trade Abolition Act. It seems to us to be the plain and obvious construction of that section, and that is not at all varied by the 8th and 9th sections, having the word "again" added, which makes a most material difference in its natural construction. When the words are merely "owned by British subjects," can we say that we are to impart into that, a totally different consideration, and make it as if it had been, "then, and up to that time, and all times, continuously owned by British subjects?" Could the Legislature mean no such thing as that expressed in the very words to which we have been referred; supposing those words to have the largest possible construction and scope that they can have, and not to be limited according to the argument of the learned Serjeant, to which we lean, and which we think is a very tenable one; namely, to vessels condemned by the Admiralty Courts as prizes, or forfeited under the Slave Trade Abolition Act? If those words are confined to the cases of prize and forfeitures, under the Abolition Act, *cadit questio*, because then there is an end of the whole argument with respect to continuous ownership, for the whole argument rests entirely upon those words; but if, as we, for the present, assume for argument's sake, these words have no such limitation, but that, instead of being restricted to those cases, are perfectly general, and do not apply merely to the cases of prize vessels and slave-trade forfeited

vessels, supposing them to be so general, according to the Respondent's argument, are we to assume that those words were added, not having existed before, for the express purpose of making what?—of making "owned," or rather "belong to" (for that is the expression there), qualified still further, by the introduction of another requisite, viz., that they should "always have so belonged to." If the Legislature thought it necessary to add these words, because the words "belong to," in themselves, were not sufficient, what are we to say, then, when they leave out these words? We cannot get over that; they leave out the words in the case in question, and say, "owned by:" then if "belong to" did not mean continuous ownership, the addition of the further words, "which shall always have belonged to," we say "owned by," in parity of reasoning, does not mean continuous ownership; but when those new words, adding an additional condition, are taken into the account, the words "owned by" must be confined to the present meaning viz., owned by, at the time of the registration.

It appears to their Lordships, therefore, that this is a case, free from all reasonable doubt, and that they must construe the words of the Act, as they find them. There is no difference between the words of the Act and the Proclamation: we must take them together; and taking them so, we are of opinion that this judgment cannot stand. It was a judgment upon a special case; the judgment states the facts, in the nature of a special verdict, and this is in the nature of a Writ of Error, upon that special verdict, though it only purports to be upon a special case. We reverse the Judgment of the Court below, and give Judgment for the Plaintiff, with nominal damages.

HIS MAJESTY'S ATTORNEY-GENERAL, at the relation of GEORGE WESTCOTT - - - - - - - } *Informant*,

WILLIAM DOUGLAS BRODIE, and others *Defendants*.*

On Appeal from the Supreme Court at Madras.

Heard ex parte.

15th Dec. 1846.

The Supreme Court at *Madras* (established by the *Madras* Charter of 1800) has an equitable jurisdiction, similar to, and corresponding with, the equitable jurisdiction exercised by the Court of Chancery in *England*, over charities.

By the 53 *Geo.* III., c. 155, sec. 111, the Advocate-General is entitled to appear and represent the Crown, in informations for the administration of charitable funds.

THE questions raised by this Appeal were, *first*, whether the Supreme Court at *Madras* had an equitable jurisdiction, similar to that exercised by the Court of Chancery in *England*, over charities; and, *secondly*, whether the Advocate-General, at *Madras*, had authority to appear on behalf of the Crown, and prosecute an information, filed for the administration of funds dedicated to charitable purposes.

These questions arose under the following circumstances:—

Peter Uscan, an Armenian merchant, and inhabitant of *Madras*, by his Will, bearing date the 19th day of *January* 1750, bequeathed the sum of 1,000 *pagodas*, in trust, to pay out of the interest of such principal sum, sufficient to keep in repair a bridge and stairs,

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir E. H. East, Bart., and Sir E. Ryan, Knt.

which he had built upon the river at *St. Thomas's* mount. By a codicil, the testator enlarged the bequest to 1,200 *pagodas*. The testator died in the year 1756. On the 8th of *January* 1805, an information was filed "by His Majesty's Attorney-General, at and by the relation of *George Westcott*, Esq., and others," in the Supreme Court of *Madras*, against *William Douglas Brodie*, *Alexander Cockburn*, and *Joseph Baker*, the trustees in whom the sum was then vested, praying that the trusts of the Will might be settled and established, and the above charitable bequest carried into execution. This information was signed as follows:—"For His Majesty's Attorney-General, *Alexander Anstruther*," who was the then Advocate-General, at *Madras*. The usual proceedings having taken place in the cause, the Supreme Court, by a decree made in 1805, referred it to the master, to take an account and for appointment of trustees. The master made his report, which was confirmed. Various orders were made in the suit, by the Court, at the instance of the Advocate-General, between that year and the year 1817. From the year 1817 down to the year 1843 no proceedings were taken in the suit.

On the 28th of *July* 1843, a petition was presented, entitled in the cause, by the Rev. *Antonio de Rozario Cardozo*, the vicar of *St. Thomas's* mount, a stranger to the suit, in which he stated that all the trustees were either dead or had left *India*; that he had expended various sums of money in repairing the said stairs; that they were still out of repair; and the petitioner prayed, that he might be paid, out of the trust-funds, the sums expended for the repairs, and that the money might be invested in Government securities, and the interest paid to the petitioner, to be applied by him,

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in and about repairing and keeping in repair the steps.

Upon this petition coming before the Court, on the 28th of *July* 1843, *George Norton*, Esq., in his capacity of Advocate-General of *Madras*, informed the Court, that he had received no notice of the petition or motion, then before the Court, and entitled in the cause, and claimed, on the part of Her Majesty's Attorney-General, a right to appear, and be heard in opposition to such motion, in case he should deem it expedient; but the Supreme Court ruled, that he had no right in his character of Advocate-General, to such notice, or to be heard in respect of such motion.

On the 7th of *August* 1843, a further motion was made on behalf of the petitioner, when the Advocate-General again claimed the right to be heard, but the Supreme Court refused to hear him, and made the order upon the motion of the petitioner.

The Advocate-General, on the 2nd of *October* 1843, on behalf of Her Majesty, moved the Supreme Court upon notice, that the order of the 7th of *August* 1843 might be set aside for irregularity; first, because the petitioner had no right or interest in the suit, or in the funds standing to the credit thereof; second, because the prayer of the petition was moved for without any notice having been served on the Advocate-General; and third, because (having reference to the state of the suit) any further proceedings in the same, must and ought to originate on behalf of the Crown, and at the suit, or on the motion, of the Advocate-General.

The Supreme Court, upon this motion, determined that the Appellant had no right, as Advocate-General, to appear or to be heard, and refused the motion. The grounds on which the Court decided that the

Advocate-General had no right to appear were, first, that the right of the Advocate-General to represent the Crown, under the Statute, 53 *Geo.* III., c. 155, sec. 111, was confined to matters involving pecuniary interests, and did not embrace those functions which the Attorney-General discharges for the purpose of enforcing the prerogatives belonging to the Sovereign, as *parens patriæ*; and secondly, that if the Statute could be construed as conferring powers to act on behalf of the Crown, in the superintendence of charities, there existed in *India* no jurisdiction to which such powers could be made to attach.

The Advocate-General petitioned for leave to appeal to Her Majesty in Council, which the Court granted. No one appearing in support of the order of the Supreme Court, the appeal was heard *ex parte*.

The Attorney-General (Sir *John Jervis*) appeared for the Crown, and said that the Crown was in favour of the appeal, but offered no argument.

Mr. *Wigram*, Q.C., (with whom was Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*,) for the Advocate-General.

The grounds upon which the Supreme Court refused to hear the Advocate-General, were, *first*, that that Court had no jurisdiction, in matters of charity; and, *secondly*, that if there was jurisdiction in the Court, yet that the Advocate-General had no right to represent the public. Neither of these propositions can be maintained.

I. The Supreme Court has jurisdiction in matters of charity.—[Lord *Brougham*: There can be no question, that the Supreme Court has jurisdiction over charities;

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we are surprised that there could be any doubt, after we decided that fact, in the case of the *Mayor of Lyons* v. *The East India Company* (*a*)].—Yes, and in *Mitford* v. *Reynolds* (*b*), Lord *Lyndhurst* expressly recognized that decision: he said, "I understand from the Acts of Parliament (13 *Geo.* III., c. 63, and 21 *Geo.* III., c. 70), by which the Supreme Court of *Calcutta* was founded, and from the case of the *Mayor of Lyons* v. *The East India Company*, that the Supreme Court of *Calcutta* exercises an equitable jurisdiction similar to, and corresponding with, the equitable jurisdiction of this Court, in matters of charity." By the Charter of *Madras*, of 1800, the Supreme Court is constituted a Court of Equity, to have an equitable jurisdiction, with the same power and authority to administer justice, in a summary manner, according, or as near as may be, to the rules and proceedings of the High Court of Chancery in *Great Britain*. It must be taken as a Court of Equity, in the largest sense. There is no difference between the Charters of *Madras* and *Calcutta* in respect of their equitable jurisdiction. If the Court below meant that the Supreme Court of *Madras*, although a Court of Equity, had not the same powers in respect of the administration of charities, as belong to the Court of Chancery in *England*, it was quite wrong. It might be, that the Supreme Court had not that peculiar jurisdiction which the Lord Chancellor, in his discretion, exercises for the Sovereign, individually, under the sign-manual. That question, however, cannot arise here. The Chief Justice thought that the Equity side of the Exchequer, previous to the abolition of that Court and its transfer, had no original jurisdiction in matters of charity. This was quite a

(*a*) 1 Moore's Ind. App. Cases, 175. (*b*) 1 Phillips, 193.

mistake, as is plainly shown from the cases of *The Attorney-General* v. *Holland* (*a*), and *The Attorney-General* v. *Molland* (*b*).— [Lord *Langdale*: That point is clear. What however was the nature of the jurisdiction of the Court of Chancery, in matters of charity, prior to the Statute, 43 *Eliz.*, c. 4 ?]—It is mentioned by Lord Commissioner *Jeykl*, in *Eyre* v. *Countess of Shaftsbury* (*c*), "that the right, which the King has, as *pater patriæ*, to take care of his subjects in cases of charities, &c., falls under the direction of the Court of Chancery." It is part of the general equitable jurisdiction. There is nothing peculiar at all in the circumstances of this particular fund being a charity ; it is a trust, and it was in that light only that the Court was called upon to execute it.— [Lord *Langdale* : The question then is, whether there is a law-officer in *India*, properly constituted to represent the Crown.]—The Advocate-General is competent to represent the public, by virtue of his position as principal law-officer of the Government, as also by the Statute, 53 *Geo.* III., c. 155, s. 111, which authorizes the Advocate-General to exhibit, in the Supreme Court, any information, or informations, in the nature of an action or actions at law, or of a bill or bills in Equity, for, or in respect of, any matter, cause, or thing, whatsoever, as fully and effectually, to all intents and purposes, as His Majesty's Attorney-General, for the time being, is, by law, authorised to exhibit any such information or informations in any of His Majesty's Courts of Equity in this country. The Court below restricts the right of the Advocate-General, by confining his right to represent the Crown, to matters involving pecuniary interests only. This is a limited interpretation, and contrary to the rule,

(*a*) 2 You. & Col. 683. (*b*) 1 Younge. 562. (*c*) 2 P. Will. 118.

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which has always been, to construe remedial acts, like the present, largely and not restrictively. *Evans* v. *Jones* (*a*). *The King* v. *Pierce* (*b*). In *The Corporation of Ludlow* v. *Greenhouse* (*c*), Lord *Redesdale* explained the origin of the Attorney-General being a party to charity cases, in these words: "Now, why was the Attorney-General a party before this Act (52 *Geo.* III., c. 101) passed, in informations filed for the purpose of carrying into execution any charitable purpose, or remedying any abuse which might exist with respect to the application of funds given for the purposes of charity? The ground stated in all the books is this, that the King is to be considered as the *parens patriæ*, that he is the protector of every part of his subjects, and that, therefore, it is the duty of his officer, the Attorney-General, to see that justice is done to every part of those subjects." Again, Sir *Anthony Hart*, in *The Attorney-General* v. *Mayor of Galway* (*d*), expresses his opinion that "it is the privilege of the Attorney-General, acting on behalf of the public, to come into a Court of Equity, even for a legal matter." The Advocate-General, as the principal law-officer, was originally a party to the suit.

It is a fallacy to view the Crown as the present *parens patriæ* in *India*. The delegated Government, the East India Company, is *parens patriæ*. By the present Charter, 3 & 4 *Will.* IV., c. 85, the entire Government of *India* is, down to the year 1854, placed under the direction of the East India Company, subject to the Board of Control. They are lessees under the Crown, of the Government of *India*, during the term of the Charter, and stand, for the period of the

(*a*) 9 Bing. 316.
(*b*) 3 Mau. & Sel. 65-6.
(*c*) 1 Bli. New. Rep., 48.
(*d*) 1 Molloy, 103.

lease, in the place of the Crown, as *parens patriæ*. There can be no doubt that the East India Company is the Sovereign ruling power. *The Nabob of the Carnatic* v. *The East India Company* (*a*). *Gibson* v. *The East India Company* (*b*). The East India Company take the privileges, with the corresponding duty, of guarding and protecting the public rights by their law-officer, who is as much a public officer, as the Attorney-General of *England*.—[Dr. *Lushington*: The only difficulty is this—suppose the Crown and the East India Company to have adverse interests ?]—No such case could occur. Under the Charter, the East India Company can have no right in anything, except as trustees for the Crown. It would be similar to the case of *Dyke* v. *Walford*, (*c*) which lately occurred here. The question there was, to whom letters of administration, to an intestate bastard, leaving goods in the Duchy of *Lancaster*, should be granted; whether to the Appellant, as Her Majesty's Procurator-General, on behalf of the Solicitor for the affairs of Her Majesty's Treasury, Her Majesty's nominee, as having devolved to Her Majesty, in right of her royal prerogative; or to the Respondent, the Solicitor for the affairs of Her Majesty's Duchy of *Lancaster*, as having devolved to Her Majesty, in right of her Duchy and County Palatine of *Lancaster*, as the nominee and for the use of Her Majesty. The law officers of the Crown appeared for the Appellant, and the Attorney-General of the Duchy of *Lancaster* for the Respondent. So it is, in this country: the Attorney-General, in all cases concerning property in *India*, appears and acts for the Crown. *The Mayor of Lyons* v. *The East India Company*. *Mitford* v. *Reynolds*. We

(*a*) 2 Ves. Jun. 56.
(*b*) 5 Bing. N.C. 273.
(*c*) 8th Dec. 1846.

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submit that the judgment of the Court below was erroneous; that the Court had jurisdiction, which, indeed, it originally exercised, by making the order; and that the Advocate-General, representing the Government, had a right to be heard. We should not have objected to the order, if the Advocate-General had been a party to it. There is, however, a technical difficulty in this case: the information was filed in the name of the Attorney-General, and not of the Advocate-General; we submit, however, that it must be taken as if filed by the Advocate-General —[Mr. *Pemberton Leigh*: The Advocate-General might have filed the information, under the powers of the Act, 53 *Geo.* III., c. 155.]—In criminal cases, the prosecutions, when the Advocate-General takes proceedings, are in the name of the Queen. *The Queen* v. *Eduljee Byramjee*(*a*), *The Queen* v. *Alloo Paroo*(*b*), but they are always conducted by the Advocate-General, who exercises the same office in criminal trials, as the Attorney-General does.—[Lord *Brougham*: Does the Advocate-General enter a *nolle prosequi*?]—Yes, and he controls the proceedings as he pleases.

Lord LANGDALE:

There are, no doubt, very curious and interesting matters which might be inquired into in this case; but if we are to investigate every curious point, which was not necessary for the purpose of a decision of the case, it would lead to a great deal of needless discussion. We apprehend there is no doubt that a jurisdiction over charitable trusts of this kind was exercised by the Court of Chancery, in this country, at the date of this Charter. The Court of Chancery has now, as it had

(*a*) 3 Moore's Ind. App. Cases, 468. (*b*) Ib. 488.

then, jurisdiction to take care that those charities are duly executed.

That being the case, then comes the Charter, giving to the Supreme Court at *Madras*, the same jurisdiction as the Court of Chancery had here. The whole of the difficulty which has been raised in this case, is upon a supposition, on the part of the Court in *India*, that the Court of Chancery had not jurisdiction. It is most singular, certainly, that the Supreme Court at *Madras* should have come to the conclusion, that they could not hear the Advocate-General, and yet that they could make an order, in the case. Their Lordships have no doubt that the Court of Chancery here would have had jurisdiction, if the matter had arisen here, and that the Court in *India* had jurisdiction, the matter originating there. In this particular case, its jurisdiction has been already exercised. It does not seem to be very material to consider, whether it has been exercised with perfect regularity, or not. Upon an application in the name of the Attorney-General, the trustees were ordered to attend, and did attend, and the money which accrued to them was brought into Court, and lodged in Court, and dealt with by the Court. That having been done, all matters of account, on the part of the trustees, have been executed. And the Court, by those proceedings, had become itself a trustee; and the question is, how that trust should be best executed. The relators are gone, they may be supposed to be dead, and the trustees may be taken to be dead. The Court is the trustee; and the question is, upon whose application, or in what form and manner, the trust is to be executed.

What has happened here, is, that a private individual comes into Court, and desires that this fund may be

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applied in a particular way, which he says is the proper way. The question is, not whether that is the proper manner of proceeding, but whether he has a *locus standi* in the Court. Then arises the question, whether the Advocate-General ought to be heard.

Now it appears to us, if we are to rely upon the Statute alone, the words of the enactment are quite sufficient, and the effect of them is not abridged by the statement of the particular purpose, which is set forth in the preamble.

There is an end of the matter. That is the whole case. The question is, whether this order has been properly made, after the refusal to hear, perhaps, the only person whose duty it was to see that the Court was duly informed of those circumstances, which it was important for the Court to attend to. It does appear to us, that that was an irregular course of proceeding. It is now stated on behalf of the Advocate-General, that if he had been present he would not have objected to the order. The order fails only on account of this irregularity. Therefore, we think it might be very well stated, that this appeal should be allowed, without prejudice to the like order being made, upon hearing the Advocate-General.

JOSIAH PATRICK WISE - - - *Appellant*,

AND

KISHENKOOMAR BOUS and SHEEB-CHUNDER GHOSE - - - } *Respondents.**

On Appeal from the Sudder Dewánny Adawlut at Calcutta.

Heard ex parte.

11th & 12th Feb. 1847.

To an action for recovery of arrears of rent, due to the Plaintiff, under a sub-lease of a *pergunna*, the Defendant pleaded, that the sub-lease was part of a loan transaction, for the purpose of securing to the Plaintiff an illegal interest,

THIS suit was brought by one *Muneeram Dey Sircar*, whose interest was afterwards represented by the Appellant, against the Respondents, to recover arrears of rent, amounting to S. Rs. 14,969. 12a. and 2g., due on a sub-lease of an eight *annas* share, in certain property included in the *pergunnas Bykontspoor, Mehar*, and situate in the district of *Dacca*. The defence to the action was, that the sub-lease was only part of other transactions, relating to a loan of money, and that the claim was affected by usury, and was void, under the 8th and 9th sections of Ben. Reg. XV. of 1793.

* Present: Members of the *Judicial Committee*,—Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

upon the loan, and was void, under Reg. XV. of 1793. The Courts in *India* held, that it was an usurious transaction, and dismissed the action. Upon appeal, this decision was confirmed by the Judicial Committee of the Privy Council.

No appearance having been entered by the Respondents, to an appeal from *India*, and the Appellant's case being ready to lodge for hearing, their Lordships, upon the application of the Appellant, made an order, that the Respondents should be served with notice, that unless they brought in their case without delay, the appeal would be heard *ex parte*; giving the Appellant liberty to proceed in the Court below, to render such service effectual; and the Court was ordered to certify to the Judicial Committee, what had been done with respect to the same.

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The suit arose under the following circumstances:—

In the year 1831, *Kishenkoomar Bous*, *Zemindar* of *pergunna Bykontspoor*, being in arrears for Government revenue, applied to the Appellant, for the loan of S. Rs. 20,000, to be paid off in the course of six years. The Appellant consented to advance him that amount, upon having the repayment thereof properly secured to him. The negociation was conducted on behalf of the Appellant, by *Muneeram Dey Sircar*, the *Gomastah* or manager of the Appellant, and it was ultimately agreed that the loan should be made, and that the securities to be given for the repayment thereof, with interest, should be the personal bond of *Kishenkoomar Bous*, and a lease of his *Zemindary*, to be made to *Munçeram Dey Sircar*, accompanied by an order from *Kishenkoomar Bous*, whereby *Kishenkoomar Bous* should direct *Muneeram Dey Sircar* to pay to the Appellant, principal and interest out of the proprietary allowance or profit rent, at certain times, which were agreed on. In pursuance of the agreement, the Appellant, on the 29th of *May* 1831, lent to the Respondent, S. Rs. 20,000, and the Respondent gave his bond to the Appellant, whereby he became bound to repay that sum, with interest, after the rate of one *per cent.* per month, by the month of *March* 1837.

At the same time, in pursuance of the same agreement, *Kishenkoomar Bous* executed a lease of his lands and *Zemindary*, to *Muneeram Dey Sircar*. This lease, after describing the property demised, proceeded as follows: "Eight *annas* share of this estate is my own, the Government assessment of which is Rs. 6,117. 9a. and 5g. This share, apart from *talookdars*, according to a separate paper signed by you, I have leased to you, for a term of six years, or from 1238

B. S. to 1243 B. S. The *Mofussil* collections of the said share amount to Rs. 14,933. 11a. and 2c. annually, according to a separate paper. Deducting from this sum the *Mofussil* collection expenses, amounting yearly to Rs. 1,160. 13a. 10g. and 2c., the fees of the lease, amounting to Rs. 1,200, the expenses of the collections made by the proprietor, the wages of attornies, &c., the expenses attendant on the payment of the Government assessment, amounting to Rs. 300, and the Government assessment, amounting to Rs. 6,117. 9a. 5g., making a total of Rs. 8,778. 6a. 15g. and 2c., the balance, viz. S. Rs. 6,155. 4a. and 5g., are due to me as proprietary allowance. This sum you shall pay me in conformity to the instalments detailed below, year after year, and instalment after instalment; you shall pay the Government assessment into the collectorate, year after year, according to the instalments fixed by Government. The profits and losses of the lease are yours, I have nothing to do with them; and you shall give me a copy of the *Mofussil* collection papers in the year your lease expires, and then give up the lease." And then there followed a detailed list, making a total of Rs. 6,155. 4a. 5g.

This lease was accompanied by a deed of possession, and, as agreed upon, it was also accompanied by an order for transfer of payment, both of which instruments were given by the Respondent, *Kishenkoomar Bous*, to *Muneeram Dey Sircar*. The latter instrument was as follows: "Having leased to you the said property, which is my estate, for a term of six years, from 1238 B. S. to 1243 B. S., I hereby authorize you to pay the sum due to me for allowance to Mr. *Wise's* banker, residing in the city of *Dacca*, from whom I borrowed Rs. 20,000, and executed a bond for the

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same. This sum, with the interest, amounts to Rs. 27,438. 2a. 5g. and 2c., for the period, and I have made it over to you—you shall pay it year after year, from the amount of allowance due to me for the said property, until the expiration of the above-mentioned term, according to the detail below; and you shall take from him, and give me, the said banker's receipts, for which you will receive acknowledgments, and after paying the whole of the amount made over to you, you shall release my bond, and produce it to me."

Muneeram Dey Sircar was let into possession, and remained in such possession for about eight months, during which period he improved the property by care and management; so that the *Mofussil* collections became considerably increased in value.

On the 15th of *January* 1832, a sub-lease of the premises was made by *Muneeram Dey Sircar* to *Sheebchunder Ghose*, and a counterpart of such sub-lease was signed and given by *Sheebchunder Ghose* to *Muneeram Dey Sircar*, which, after describing the property, was, in its material particulars, in the following words: "Having made an application to you for sub-lease, on the terms of your lease, I have taken a sub-lease of the said share from you, on the security of the proprietor of the land, *Kishenkoomar Bous*, for a term of six years, from 1238 B. S. to 1243 B. S.: the *Mofussil* collections of the said share, inclusive of the excess to which I have agreed, amount to Rs. 15,783. 11a. and 2c. Deducting from this sum the expenses of *Mofussil* collections, amounting yearly to Rs. 1,160. 13a. 10g. and 2c., the expenses of the collections made by the proprietor of the land, the wages of attornies, &c., and other expenses attendant on the payment of the Government assessment, amounting to Rs. 300, the

Government assessment, amounting to Rs. 6,117. 9a. and 5g., and the allowance of the proprietor of the land, amounting to Rs. 1,055. 4a. and 5g. per annum, making a total of Rs. 8,663. 11a. and 2c., the balance, viz. Rs. 7,150, which is due to you, I will pay to you according to the detail below, year after year, and month after month, to the end of the sub-lease. I will pay the Government assessment for the term of my sub-lease, according to the instalments fixed by the Government, instalment after instalment, into the district collectorates. I will pay yearly the allowance of the proprietor of the land to the term of my sub-lease. I will take his receipts, and give them to you." Then followed a detail of instalments, amounting to S. Rs. 7,150.

Annexed to the sub-lease was the security-bond of *Kishenkoomar Bous*, whereby he became bound to *Muneeram Dey Sircar*, for the due performance of the conditions of the sub-lease, to the following effect: "I, *Kishenkoomar Bous*, landholder, execute this security-bond, and hereby become surety, agreeably to the tenor of this counterpart of sub-lease, on the strength of the property mentioned therein. I will liquidate your due of Rs. 7,150, yearly, in conformity to the instalments affixed, and the Government assessment, amounting to Rs. 6,117. 9a. and 5g., in conformity to the instalments due to the Government, year after year, and month after month, until the expiration of the term of the sub-lease."

Sheebchunder Ghose, and his surety, *Kishenkoomar Bous*, paid only portions of what was due from them, according to this agreement, and the arrears, in *January* 1834, amounted, for principal, to S. Rs. 13,164. 2a. and 7c., and for interest, for the non-payment of instal-

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ments, during the same period, to Rs. 1,805. 10a. and 1c., making a total of S. Rs. 14,969. 12a. and 2g. For the recovery of these arrears, *Muneeram Dey Sircar* filed his plaint, on the 25th of *May* 1834, in the *Zillah* Court of *Dacca*, against *Sheebchunder Ghose* and *Kishenkoomar Bous*, praying that such arrears might be decreed to be paid to him.

Sheebchunder Ghose did not appear, or file any answer to the plaint; but on the 11th of *March* 1835, *Kishenkoomar Bous* put in his answer, stating, in substance, that owing to the difficulties under which he laboured, he was induced, by the Appellant, to borrow money of him, at the excessive interest of 3 *per cent.* per month; that as the charging of such excessive interest was prohibited by the Regulations, an arrangement was made, by which 1 *per cent.* of that amount should, as was customary, be inserted in the bond, on account of the loan, while the remainder should be charged under the cover of the terms, fees of the lease, and profits of the sub-lease; that a bond for the debt, and a deed of lease, was immediately given, but it was agreed that the sub-lease should not be executed until some days after; that as the interest due to the Appellant, for the amount, at S. Rs. 3 *per cent.* per month, would have amounted, from the month of *Bysakh* 1238 B. S. to 1243 B. S. (the six years mentioned in the bond), to S. Rs. 22,314. 6a. 16g. and 2c., the Appellant caused Rs. 7,438. 2a. 5g. and 2c. of this sum to be inserted in the order for transfer of payment, and S. Rs. 7,200, as fees of the farm, in the deed of lease, making together, S. Rs. 14,638. 2a. 5g. and 2c., and that at the writing of the sub-lease, the Appellant wished *Kishenkoomar Bous* to insert the balance due to him, i. e., S. Rs. 7,676. 4a. and 11g., under the term, profits of

lease, but that *Kishenkoomar Bous* made known the distresses under which he laboured, and procured the remission of S. Rs. 2,576. 4a. and 11g., and inserted the balance in counterpart of the sub-lease, as profits of the sub-lease, to be paid in annual instalments of S. Rs. 850, which, in course of time, amounted to S. Rs. 5,100. That the Appellant was, in reality, the proprietor of the amount of loan, and of the lease, and of the sub-lease, and had taken a deed of lease of his, *Kishenkoomar Bous's*, property, nominally in the name of *Muneeram Dey Sircar*, who was his servant, and had caused a deed of sub-lease, of the property, to be given by him to *Sheebchunder Ghose*, a relative of his, merely with the view to receive excessive interest; and he submitted, that the claim and plaint of the Plaintiff was unworthy the cognizance of the Court, and could not be held good, for the following reasons: First, because it was clear, that as the Appellant was the proprietor of the money lent, of the lease, and of the sub-lease, and as the lease had only been effected in the name of the Plaintiff nominally, his claim and plaint could not be admitted by the Court, according to a circular letter of the *Sudder Dewanny Adawlut*, dated 29th of *July* 1809 (*a*). Secondly, because the Appellant had charged Rs. 3 *per cent.* interest on the amount of loan, inserting 1 *per cent.* in the bond, and including the remaining 2 *per cent.* in the fees and profits of lease and sub-lease, and had also, on various dates between the date of writing the deed of lease and the 17th *Phagoon* 1240 B.S., recovered Rs. 6,710. 13a. 18g. and 1c., in part payment of the principal and interest, for fees of the lease, and for profits of the sub-lease, and had caused receipts of those sums to

(*a*) Post, 217.

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be given to *Sheebchunder Ghose*, by the Plaintiff, mention being made of their having been paid through *Kishenkoomar Bous's* agents, merely with the view to establish the lease and sub-lease, although *Sheebchunder Ghose* had never been in possession of the sub-leased property, and had never paid a single farthing on his own account, and that, consequently, according to the provisions of sect. 9, of Reg. XV. of 1793, the Appellant's claim was not in any way worthy the cognizance of the Court. And thirdly, that the bond and the deed of lease were written, and the amount of loan given, on the 17th *Jeyt* 1238 B.S. Whereas the Appellant had taken interest from the commencement of the month of *Bysakh*, to the 16th of *Jeyt* 1238 B.S., one month and sixteen days prior to the giving of the loan, &c.; that at 3 *per cent.*, the amount taken would have amounted to Rs. 920 and 2c., and that this sum had been divided among the fees of the lease, profits of the sub-lease, and the order for transfer of payment.

Shortly after the filing of this answer, and on the 30th *November* 1834, *Muneeram Dey Sircar* assigned all his interest in the leased property to the Appellant, whereupon the Appellant petitioned the Court, that he might be considered Plaintiff, in the room of *Muneeram Dey Sircar*, and be allowed to conduct the suit; and on the 12th of *June* 1835, the Court determined upon proof of the assignment, after taking the evidence of several witnesses, that the Appellant should be considered Plaintiff in the room of *Muneeram Dey Sircar*, and that he should file his replication to the answer of *Kishenkoomar Bous.*

On the 28th of *August* 1835, the Appellant filed his replication, wherein he denied the alleged agreement for excessive interest, and averred that the assertion of

the lease and sub-lease being cloaks to screen the alleged excessive interest of 3 *per cent.*, was false; that, had it been true, the sub-lease would also have been affected. That the Defendant's plea, that interest had been charged for an excessive period, i. e., for one month and sixteen days, was far from true, for the interest of one month and sixteen days, which the Appellant had received on account of the sub-lessee from the said lessee, was Rs. 306. 10a., 13g., and 1c., and he had given a receipt for that amount to the lessee; that were the interest of the amount lent, in reality 3 *per cent.*, the defendant, *Kishenkoomar Bous*, would, assuredly, when the deduction of the interest of one month and sixteen days was made, have deducted Rs. 920, which was the sum the interest amounted to, at the rate of 3 *per cent.*, in that time. That he, the Appellant, was not the proprietor of the amount of loan nor of the lease, but that he had then become proprietor of the sub-lease, solely on the strength of the assignment, which *Muneeram Dey Sircar* had granted to him; that the amount mentioned in the petition, as liquidated by the Defendant, was paid on account of the amount of sub-lease; that, in proof of this, there were *challans* and receipts forthcoming, and that, therefore, the provisions of Reg. XV. 1793, which referred only to the giving and taking of interest on loans, could not apply to the case in question, instituted for arrears of rent. That, under the circumstances, the giving of the property on a sub-lease, and the institution of a suit for the recovery of its rent, which had fallen into arrears, was an answer to the pleas set forth by the Defendant, in opposition to the documents written and given by the lessee, and it was submitted that such pleas could not be worthy of the Court's consideration.

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Witnesses were examined, who proved the above facts, and from whose evidence it appeared that the lease and sub-lease were executed, to secure a larger amount of interest than allowed by the Regulations.

The case came on for hearing at various times before the *Zillah* Court of *Dacca*, and on the 1st of *June* 1837, the Acting Judge of the Court made his final decision, that the case should be dismissed with costs, on the ground that the taking of the bond in the Appellant's own name, the effecting a lease in the name of his servant, and the sub-leasing of the property to the Defendants, were all, in effect, one and the same thing; that the lease and sub-lease were mere means of charging excessive interest, once as interest of the amount of the bond, again as fees of the lease, and again as profits of the sub-lease.

The Appellant appealed from this decree, to the *Sudder Dewanny Adawlut* of *Calcutta*.

The case was heard by no less than five Judges of the *Sudder* Court, in succession.

Mr. *Edward Lee Warner*, before whom the case was first heard, considered that it was improper to allow the Appellant to take the place of *Muneeram Dey Sircar*, in the suit, because the Appellant was the owner of the bond, the effect of which he considered might be, that the Appellant, if he recovered for the rent, might obtain excessive interest, and, on this ground, he, by an order, bearing date the 14th of *May* 1840, ordered, that the papers should be laid before another Judge, to the end that the appeal should be dismissed, and that the order of the district Judge should be modified thus,—that the Appellant should be at liberty to claim the amount of bond, from whom-

soever it was due, and that the original suit should be dismissed, by way of nonsuit, and struck off the file of the Court.

Mr. *Carmichael Smith*, the Judge before whom the case was next heard, thought that the Appellant was in reality the proprietor of the lease, from the commencement, and that his concealing that fact, and causing the suit to be instituted in the name of *Muneeram Dey Sircar*, was suing in a fictitious name, and was contrary to the provisions of the circular order of the *Sudder Dewanny Adawlut*, dated 29th *July* 1809, and he, therefore, concurred in the propriety of a nonsuit. He differed in the result from Mr. *Lee Warner*, as to its being a proper course to insert, in the decree, any direction for liberty to sue on the bond, and by an order, dated the 6th *July* 1840, ordered that the papers should be laid before a third Judge, that a final order might be passed.

The case was then heard by Mr. *Thomas P. Biscoe*, who differed from Mr. *Warner* and also from Mr. *Smith*. He considered that the appeal should be dismissed on the merits, upon the ground that the bond, and the lease and under-lease, were fraudulent means of charging excessive interest. That the case was clearly not a case of suing in a fictitious name, and that it was not a proper case for a nonsuit. Under these circumstances, Mr. *Biscoe*, by his order, bearing date the 7th of *August* 1840, ordered that the file of the case should be forwarded to a fourth Judge, with the view to the making final of the following order, viz. that the appeal and claim of the Appellant be dismissed, that the order of the Judge of the district be upheld, and that the costs of the Court should be charged to the Appellant.

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The case was then brought before Mr. *Charles Tucker*, the fourth Judge, who came to the conclusion, that the case of the Defendant was inconsistent, and palpably untrue, and that the evidence by which it was sought to be supported was throughout contradictory, and unworthy of credit; and accordingly, Mr. *Tucker*, by an order bearing date 18th *August* 1840, directed that the case should be laid before a fifth Judge, to make the final order that the appeal be decreed, and the order of the Judge of the District Court reversed.

In pursuance of this order, the case was laid before Mr. *Abercrombie Dick*, the fifth Judge. He considered that the Appellant had relied entirely upon the lease to *Muneeram Dey Sircar*, as his security for the money advanced by him to *Kishenkoomar Bous*, and that if the lease alone had been effected, the amount of loan would not have been injured by that single circumstance, because the lessee was only to receive Rs. 1,200 a-year, which could only be considered as compensation for risk and labour; but connecting the transaction with the under-lease, he was of opinion, that the Rs. 1,200, fees of the lease, and Rs. 850, or profit rent of sub-lease, making together Rs. 2,050, were to be paid apart from the interest at 12 *per cent.* per annum, and consequently that the affair was contrary to the provisions of Reg. XV. 1793; and considering that his opinion concurred with that of Mr. *Biscoe*, finally ordered, on the 8th of *September* 1840, that the appeal and claim of the Appellant should be dismissed, and the order of the District Judge of *Dacca* confirmed.

From this decree the present appeal was brought.

The Appellant's case being ready to lodge, and no appearance to the appeal having been entered by either of the Respondents, the Appellant moved that

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he might be at liberty to serve notice upon the Respondents personally, or upon their representatives, in *India*, of the pendency of the appeal, and that if no proceedings were taken therein, by the Respondents, and no appearance entered, the case would be heard *ex parte*, and that the Appellant should be at liberty to take all such proceedings in the Court below, as might be requisite to render such notice effectual.

Mr. *Wigram*, Q.C.,

July 18th, 1846.*

In support of this application, referred to the case of *Konadry Valabha* v. *Valia Tamburati* (*a*), where their Lordships refused to hear an appeal, *ex parte*, until the Respondent had been served in *India*.

* Present: The Lord President, Lord Brougham, the Right Hon. Dr. Lushipgton, and the Vice-Chancellor Knight Bruce.

(*a*) KONADRY VALABHA - - - - - - *Appellant*,

AND

VALIA TAMBURATI - - - - - - *Respondent*.†

On Appeal from the Sudder Dewanny Adawlut of Madras.

Feb. 3rd, 1844.

THIS Appeal was referred, by Her Majesty in Council, to the Judicial Committee of the Privy Council, on the 23rd of *December* 1837. No appearance was entered for the Respondent, and the

Their Lordships declined to hear an appeal, from the *Sudder Dewanny* at *Madras*, *ex parte*,

† Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillor,—*Assessor*,—Sir E. Ryan, Knt.

without evidence of the Respondent having been personally served with notice, that the appeal was pending; and ordered the appeal to stand over, with leave for the Appellant to proceed in the Court below, to render service of such notice effectual.

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Their Lordships made the following order upon the motion :—

"Whereas no appearance hath been entered on behalf of the said Respondents, or either of them, to the said Appeal,—their Lordships are therefore pleased to order, as it is hereby ordered, that the said Appellant be at liberty to serve due notice upon the respec-

appeal having been set down, came on for hearing, *ex parte*, on the 3rd of *February* 1844.

Feb. 3rd, 1844.

Upon the appeal being opened by the Appellant's Counsel, their Lordships declined to hear it, *ex parte*, without evidence of the Respondent having been served, in *India*, with notice of the appeal being about to be heard *ex parte*, and directed the case to stand over, with leave for the Appellant to serve the Respondent with such notice.

The following Order in Council was made :—

"Whereas, Her Majesty has been pleased, by Her Order in Council, of the 22nd *May* 1840, to refer unto this Committee, the humble petition and appeal of *Konadry Valabha, Rajah* of *Valuvanad*, in the province of *Malabar*, against *Valia Tamburati*, of the *Kelake Kovilagam*, the *Amma Rajah* of *Calicut*, from a decree of the Court of *Sudder Dewanny Adawlut* of *Madras*, of the 23rd *December* 1837; and whereas no appearance hath been entered, on behalf of the said Respondent, to the said appeal,—their Lordships are thereupon pleased to order, as it is hereby ordered, that the said appeal do stand over, with leave to the Appellant, or his agents, to serve due notice upon the Respondent, in person, in *India*, that the said appeal is now pending before Her Majesty in Council, and that no proceedings have been taken on behalf of the said Respondent, and that in case no appearance be entered by the said Respondent, in his own behalf, or by his agents, duly appointed by him, their Lordships will proceed to hear the case *ex parte*; and their Lordships do further direct, that the said Appellant shall be at liberty to take such proceedings in the Court below, as are requisite to render such notice effectual."

The Respondent afterwards appeared, and the appeal was heard on the 11th and 12th days of *May* 1846, and the decree of the Court below was affirmed with costs. The appeal raised no point of law, the question involved being one of fact only.

tive Respondents in person, or their respective representatives, in *India*, should either of them be dead; that this appeal was registered on the 10th day of *October* 1844, and that the same is now pending, before Her Majesty in Council, the printed case on behalf of the Appellant having been duly lodged, and that no proceedings have been taken by the Respondents, or either of them, and that in the event of the Respondents not appearing, and bringing in their case without delay, their Lordships will proceed to hear the case *ex parte*; and their Lordships do further direct, that the said Appellant shall be at liberty to take such proceedings in the Court below, as may be requisite to render such notice or notices effectual; and the said Court of *Sudder Dewanny Adawlut* is hereby directed to certify to this committee what shall be done with respect to the same."

In pursuance of this order, the *Sudder Dewanny Adawlut* transmitted the same to the Civil Court of *Dacca*; and that Court, upon the application of the Appellant, directed a translation of the order to be made and given to the *Nazir* of the Court for service. The *Nazir* personally served *Kishenkoomar Bous's* representatives, he having died pending the appeal.

These proceedings were transmitted by the *Dacca* Court to the *Sudder*, and by that Court to *England*, and no appearance having been entered by the Respondents, the appeal now came on for hearing.

Mr. *Wigram*, Q. C., and Mr. *Walpole*, for the Appellant.

It is not disputed, that the rent claimed in the action is in arrear, and due, according to the reservations contained in the sub-lease; but it is alleged,

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in the answer by the Respondent, *Kishenkoomar Bous*, that this sub-lease is only part of other transactions relating to the loan, and that the claim is affected by usury, and void under sections 8 and 9 of *Bengal* Reg. XV. of 1793. The contrary however is the case. The sub-lease was a transaction long subsequent to, and unconnected with, the loan, made by the Appellant to the Respondent. The profits of the original lease, and the profits reserved by the sub-lease, were unconnected with the rate of interest made payable to the Appellant, and were the exclusive profit of *Muneeram Dey Sircar*, until the same were assigned by him to the Appellant. A legal contract cannot be made illegal and void, *ab initio*, by a subsequent act which has no connection with it. The provisions of the 8th and 9th sections of *Bengal* Reg. XV. of 1793, do not apply to a case like this. Even if they did apply, which we contend they do not, they would relate to a forfeiture of the interest only, and not involve a forfeiture of the principal. As this Regulation is penal, it must be construed strictly, as a penal Statute is construed here. 1 Bla. Com. 88. *Buckeridge* v. *Flight* (*a*). It cannot be held to work a total forfeiture of both principal and interest, even admitting that the action could not be maintained by sections 8 and 9 of the Reg. XV. of 1793, so far as relates to the interest; but the Court below were not justified in dismissing the action, which included both principal and interest: and if this Court is disposed to affirm the decree appealed from, we trust your Lordships will make a declaration, that the principal may be recovered, although the interest cannot be, on the ground of usury; or that the Court will in its judgment declare, that such affirmance is with-

(*a*) 6 B. & C. 55.

out prejudice to our right to bring a fresh action. The Plaintiff's claim is not a claim in a fictitious name, for recovery of money within the meaning of the circular order of the *Sudder Dewanny Adawlut*, of the 29th of *July* 1809 (*a*); since the suit was originally instituted, and afterwards carried on, with the permission of the Court, by the party who was the rightful proprietor of the rent in arrear.

Lord CAMPBELL:

In this case, their Lordships are prepared to give their opinion, without the expense and delay which would arise, from appointing a subsequent day on which to pronounce judgment.

The appeal, in truth, involves a pure question of fact. There is no question of law arising in it. When there is a question of law, their Lordships are always most anxious, as this is a Court of the last resort, to take time to consider, and it has been the habit of their Lordships to take time to consider, and after full communication with all those who have been present, when the case has been argued at the Bar, to pronounce a written judgment; but this is a pure question of fact, whether there was an usurious agreement between the parties to this suit.

(*a*) The following is an extract of this circular order: "The *Sudder Dewanny Adawlut* having reason to believe that a practice prevails in several parts of the country, of instituting suits for the recovery of money, under fictitious names, and the Court considering such a practice to be highly objectionable, as being liable to abuse and fraud, the Court direct that you will issue instructions to the several *Zillah* and City Judges, subject to your decision, directing them to affix a publication in their respective *Cutcherries*, declaring that any person who shall hereafter issue a suit in their Courts under a fictitious name, should be liable to be nonsuited."

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If the bond, the lease, and the sub-lease, were a mere shift for usury, it is allowed that this action cannot be maintained; at least it is allowed, that it cannot be maintained to recover the interest.

Now the *Dacca* Court, and the *Sudder* Court, who had all the evidence before them, and who, we must say, were more competent to come to a right conclusion, on a mere question of fact, than we are, came to a conclusion that this was a shift for usury; and it would require very clear argument to show that they had come to a wrong conclusion upon a pure question of fact.

But their Lordships are of opinion, that they came to a right conclusion, and that they could have arrived at no other.

This seems to their Lordships to be a case free from all doubt, *res ipsa loquitur*.

The written documents raise a case of very great suspicion, and they can hardly be opened without believing that they were intended to cover an usurious contract. That suspicion is proved to be the fact by a number of witnesses, who do not agree on minute particulars; and therein, perhaps, are more credible than if they did; but who substantially prove, that there was an agreement between these parties that more than the legal interest should be reserved, and that these instruments were executed for the purpose of securing that illegal interest. We see no reason for disbelieving those witnesses; and if they are believed, it is conceded that the defence is established.

We are then asked, at all events, to pronounce a declaration whereby the principal is to be recovered, although the interest may not, on the ground of usury. But it seems to their Lordships quite clear, that it is utterly impossible for them to pronounce such a judg-

ment in this action, because it is an action which is, in substance, brought to recover the interest due on a loan; and the 9th sec. of Reg. XV., 1793, which has been referred to, expressly requires that, in such an action, no other judgment should be given but for the dismissal of the suit, the costs to be paid by the Plaintiff.

If, therefore, in this case, we were to pronounce a judgment whereby the principal should be recovered, without interest, such a judgment would be in complete defiance of that Regulation, by which we are bound.

We are, then, called upon to pronounce a special declaration respecting the right to bring a fresh action.

Now their Lordships are of opinion, that they are not at all called upon to pronounce any special declaration, but to leave this judgment to have its legal effect. If the judgment is a bar to any future proceeding, there is no reason why it should not have that operation. It may be strongly argued, that the question of usury has been decided in this case; but if the question has not arisen, whether the principal may be recovered, without interest, then the plea of *res judicata* cannot be applied to a subsequent proceeding which has for its object to recover the principal, without interest; because, if that question does not arise here, it cannot be adjudged here, and the plea, *res judicata*, can be no bar to a subsequent proceeding.

However, upon this question, whether the principal may be recovered without the interest, which involves the construction to be put upon the 8th and 9th sections of this Regulation, we are not at all called upon to give an opinion, and we cautiously abstain from doing so.

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The only opinion their Lordships pronounce is, that the judgment ought to be affirmed, and, consequently, that the appeal should be dismissed. As the Respondents do not appear, we need say nothing about costs.

IN RE JAMES MINCHIN.*

On Appeal from the Supreme Court of Madras.

Heard ex parte.

12th & 13th February 1847.

An order, made by the Judges of the Supreme Court of *Madras*, dismissing the Master of that Court from his office, for alleged official misconduct, in the taxation of a bill of costs, reversed upon appeal, by the Judicial Committee of the Privy Council.

THIS was an appeal by *James Minchin*, Esq., Barrister-at-law, late Master of the Supreme Court of *Madras*, against an order of that Court, bearing date the 11th of *June* 1845, dismissing him from his office of Master, for alleged official misconduct in the taxation of a bill of costs, in a cause of *Moottoo Ram* v. *Campbell*.

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir A. Johnston, Knt., and Sir E. Ryan.

Such an order, being made by the Court at its own instance, is not an appealable grievance, within the *Madras* Charter of Justice of *December* 1800.

An appeal having been allowed by the Court below, and referred by Her Majesty to the Judicial Committee for adjudication in the ordinary way, their Lordships, though of opinion that there existed no charter right of appeal, thought it a fit case for the allowance of a special appeal; and having heard the case upon the merits, directed a petition for special leave to appeal to be presented to Her Majesty; which on being referred to them, they recommended the allowance thereof, and that the appeal be placed in the same plight and condition as that originally referred to them.

The particular facts and circumstances which led to the making of this order, are fully stated in the judgment of their Lordships.

Mr. *Bethell*, Q. C., and Mr. *Goodeve*, for the Appellant,

Upon opening the appeal, were stopped.—[Lord *Brougham*: There is a defect in this case. If you come here under the Charter, you have no right to appeal. By the terms of the Charter, the appeal given, is confined to judicial acts, namely, "judgments or determinations"(*a*). No leave to appeal has been granted.]—In *Morgan* v. *Leech* (*b*), an appeal was allowed from an order of the Supreme Court at *Bombay*, admitting certain persons, who were not duly qualified, as attornies. The order, removing Mr. *Minchin*, is in the nature of a punishment, which the Court has inflicted, *ex mero motu*.—[Lord *Langdale*: The Court judged

(*a*) The clause in the *Madras* Charter, relating to appeals, is as follows:—"And it is our further will and pleasure, and we do hereby direct, establish, and ordain, that if any person or persons shall find him, her or themselves aggrieved, by any judgment or determination of the said Supreme Court of Judicature at *Madras*, in any case whatsoever, it shall and may be lawful for him, her or them to appeal to us, our heirs or successors, in our or their Privy Council, in such manner, and under such restrictions and qualifications, as are hereinafter mentioned, that is to say, in all judgments or determinations made by the said Supreme Court of Judicature at *Madras* in any civil cause, the party or parties against whom, or to whose immediate prejudice, the said judgment or determination shall be or tend, may, by his or their humble petition, to be preferred for that purpose to the said Court, pray leave to appeal to us, our heirs or successors, in our or their Privy Council, stating in such petition the cause or causes of such appeal." See also the 3 & 4 *Will.* IV., c. 41; 6 & 7 *Vict.*, c. 38; and 7 & 8 *Vict.*, c. 69.

(*b*) 2 Moore's Ind. App. Cases, 228.

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in its own case: it was not an order made in the course of a judicial proceeding.]

The Appellant's counsel were then directed to argue the case upon the merits, and they contended that no case of misconduct, to justify the removal of the Master, had been established.

At the conclusion of the argument, their Lordships gave Mr. *Minchin* liberty to present a petition for leave to appeal, which they would recommend Her Majesty to grant, and then give their judgment upon the merits.

In accordance with the leave thus given, Mr. *Minchin*, on the same day (13th *February*), presented a petition to Her Majesty in Council, which after setting forth that he was advised that he had not a right of appeal against the order of the 11th of *June* 1845, removing him from his office of Master, and that Her Majesty's most gracious leave was necessary to maintain such appeal, prayed that leave to appeal might be granted to him against such order of the Supreme Court at *Madras*, and that Her Majesty would be pleased to refer such appeal to the Judicial Committee of Her Most Honourable Privy Council for adjudication by them, and that the said petition of appeal so presented to Her Majesty might stand in the same plight and condition as the same then was.

The Judicial Committee, upon this petition being referred to them, reported to Her Majesty as their opinion, that leave ought to be granted to the petitioner, to enter and prosecute the appeal from the order of the 11th of *June* 1845, the same not being an appealable order, under the ordinary provisions of the Charter of the said Court; and their Lordships did

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further recommend that the Appeal should come on for hearing upon the petition of appeal, and the printed case already lodged on behalf of the petition, and that the appeal should be allowed to stand in the same plight and condition as if the same had not been irregular.

Lord LANGDALE:

4th March 1847.

This is an appeal against an order of the Supreme Court of *Madras*, dated the 11th of *June* 1845, whereby Mr. *Minchin* was dismissed from his office of Master of that Court, for alleged misconduct.

He was appointed to his office on the 2nd of *February* 1841. His remuneration consisted of fees which he was entitled to charge and receive, and it was one of his duties to tax the bills of costs of solicitors.

A table of fees, to be allowed to the Master and other officers, and to the solicitors, was published in the year 1802; but after the publication of that table, it became the practice to allow some fees which were not distinctly specified in the table; and that which has commonly happened elsewhere, appears to have happened in the Supreme Court of *Madras*. The fees usually allowed in practice seem to consist in part of fees strictly lawful, and considered to be reasonable, and in part of fees neither lawful nor reasonable.

It appears that, at the time of his appointment, Mr. *Minchin* considered that he was entitled to receive all the fees which had usually been allowed to the Master, whether they were distinctly specified in the table or not; and his view of the subject was confirmed by a communication which he received from the Chief Justice, in the year 1842. At that time some reductions

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were contemplated, and, with respect to them, Mr. *Minchin* was asked upon what terms he had accepted the office; and after he had stated the terms, the Chief Justice, in writing to him, expressed himself as follows: —"It is upon your successor, therefore, that our retrenchment must fall."

But, in 1845, the Judges of the Supreme Court, having again in view the very laudable object of diminishing the expense of proceedings, by a general reduction of fees, directed a circular to be sent to the solicitors of *Madras*, desiring information upon the subject of costs allowed on taxation: they were informed that some of the charges made in the Master's office were objected to, and complained of; and on the 22nd of *March* 1845, the particulars of the various charges objected to, were communicated to Mr. *Minchin*, who, on the 26th of *March*, gave such explanation of those charges as he thought fitting; and on the 31st of the same month, the Chief Justice informed him, by letter, that, with one specified exception, the charges objected to, were not consistent with the table of fees, and that the Judges would not be able to allow them in any future bill of costs. The Judges considered that Mr. *Minchin* was entitled only to such fees as were distinctly specified in the table. Mr. *Minchin*, on the other hand, considered that, in addition to those fees, he was also entitled to such fees as, previously to the time of his accepting office, and according to the supposed due construction of the table, had been received by his predecessors, without objection or question.

In these circumstances, Mr. *Minchin* desired to examine witnesses upon the usage, and to appeal from the disallowance, which had been announced, and on the 1st of *April* he informed the Chief Justice, that he

should hold his office only until the question had been decided in *England*, upon appeal, from the decision, after an examination of the late Chief Justice, Sir *Robert Comyn*, and Mr. *Savage*, who was formerly Master. On the following day, the 2nd of *April* 1845, Mr. *Minchin* expressed his desire to return to *England*, and requested leave of absence, and that another person might be allowed to act for him. He further requested an expression of the opinion of the Chief Justice, upon his conduct.

In answer to that letter, the Chief Justice stated to the effect, that the Judges wish to effectuate the intention which Mr. *Minchin* had expressed, to carry the appeal up to the Privy Council, and in order to enable him to do so in the least circuitous manner, it struck them, that an order of Court, prohibiting the paying or receiving the fees which they condemned, would best answer this purpose; and the Chief Justice, after expressing the desire of both the Judges to comply with Mr. *Minchin's* request for leave of absence, proceeded as follows:—"I could, with perfect truth, and with the utmost satisfaction, bear testimony to the zeal, energy and ability which you have displayed in the different stations in which I have seen you employed, whether at the Bar, or as Clerk of the Crown, or Master of the Courts; and this testimony I shall be happy to give under my hand, in the event of your departure, but it will be better to do so in a letter, which does not contain other matters." Mr. *Minchin* was thankful to the Judges for putting their construction of the table of fees, in a form to enable him to make it the subject of appeal, and expressed his intention to move for a commission to take the declaration of Sir *Robert Comyn*, and the affidavit of Mr.

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Savage, upon the subject. He intimated that the course pursued might prevent the necessity of his immediate departure for *England*, and hoped the Judges would not hesitate to give him copies of the allegations made to them respecting the administration of his office.

To this the Chief Justice answered, on the morning of the 5th of *April*, as follows:—"The order to which you can refer, and against which you appeal, will, I think, be promulgated to-day. We are sorry we cannot comply with your request to have copies of the allegations which have been laid before us, in relation to your office and the charges made in it."

The order thus referred to, was, in fact, made on the 5th of *April* 1845, and it prohibited the allowance of several fees, which Mr. *Minchin* and his predecessors had been accustomed to receive, and to which Mr. *Minchin* thought himself entitled.

Mr. *Minchin* thereupon petitioned the Court, for a commission to examine Sir *Robert Comyn*, Mr. *Savage*, the late Master, and Mr. *Acworth*, a former Registrar, touching the matters in question, and for copies of all letters, or other writings, containing representations, charges, or other informations respecting the office of the Petitioner, or to the office or charges thereof referred to, in and by the order of the 5th of *April*. That petition was, on the 18th of *April* 1845, heard before Mr. Justice *Burton*, who refused to grant its prayer, and also refused to give leave to appeal from his decision. There is no appeal from that order, and, therefore, we are not required to give any opinion upon it.

The endeavour of Mr. *Minchin* to obtain additional evidence, with a view to an appeal, was unsuccessful;

after some delay, arising from the want of a Special Court, which Mr. *Minchin* had in vain requested, he moved to rescind the order of the 5th of *April*. A joint affidavit of himself, and Mr. *De Silva*, his chief clerk, was sworn on the 9th of *May* 1845. It is very long, and states, at length, the circumstances in which the fees in question had been charged, and the grounds and reasons upon which Mr. *Minchin* considered himself to be entitled to them. The motion was made on *Friday*, the 16th of *May*, and was dismissed. As the order dismissing that motion was not made the subject of appeal, we are not required to express an opinion upon it, or upon the order of the 5th of *April*, or upon the authority of the Court, to disallow the fees claimed by Mr. *Minchin*. But it appears, that on the same day upon which Mr. *Minchin's* motion was dismissed, the Judges did, of their own authority, rescind the order of the 5th of *April*, as to two items of charge therein specified.

On the 19th of *May*, Mr. *Minchin* wrote a letter to the registrar of the Court, as follows:—"Sir, I shall feel obliged by your communicating to the Honourable the Judges, that, feeling it impossible for me (after the observations made on *Friday* last, against my conduct individually, although the matters on which those observations arose, extended to the practice of the office, as established by my predecessors) to carry on the duties of the office of Master, with satisfaction to myself, and benefit to the suitors, I beg to resign the appointment."

It appears, that pending the discussion which had taken place, respecting the order of the 5th of *April*, certain bills of costs, which had been filed by the Master, in the cause of *Mootee Ram* v. *Campbell*, had

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been laid before the Chief Justice, for his allocatur, and Mr. *Minchin's* resignation having been tendered on the 19th of *May*, Mr. Justice *Burton*, on the next following day, the 20th, directed his clerk, Mr. *Carruthers*, to write to Mr. *Wilkins*, Messrs. *Rowlandson* and *Rose*, and Mr. *Crampton*, the solicitors who had been employed in the case, and whose charges appeared in the bill of costs; for information respecting certain matters of business, in respect to which some of those charges purported to be made.

Answers to the letters of Mr. *Carruthers* were sent, partly on the 20th, and partly on the 21st, the next day following. The answers afford ground for believing that some charges were, or might have been, allowed for business not actually done, and Mr. *Serle*, the Registrar, by letter of the 21st of *May*, informed Mr. *Minchin*, that the Judges had directed him to say, that there were allegations then before them, which related to his conduct as Master and Taxing-officer, and that as these allegations, if unanswered, formed, in their opinion, good grounds for removing him from his office, they could not consent to accept his resignation.

On the 23rd of *May*, Mr. *Carruthers*, the clerk of Mr. Justice *Burton*, made an affidavit, setting forth the correspondence with the solicitors of the 20th and 21st; and on the 23rd, the same day, it was ordered, that Mr. *Minchin* should attend on *Friday*, the 30th of *May*, to show cause, if any he had, why he should not be removed from his office of Master of the Court, for misconduct, in the order mentioned.

The misconduct thus generally described, was particularized in no less than twenty-six distinct allegations, set forth in the order. Twenty-two of the dis-

tinct allegations related to affidavits of service of warrants to attend the Master, in cases where the parties did not really attend; the misconduct alleged was, that fees had been allowed for affidavits of service, and for attendances to get them sworn, and for the attendance of the Master to receive the same, when such affidavits of service were wholly unnecessary. Two others, of the distinct allegations, related to the attendance upon warrants, stated to be not attendable warrants. The misconduct alleged was, that fees were allowed to the solicitor and Master for attendance thereon. The remaining two, of the twenty-six distinct allegations, related to copies of minutes, never made. The alleged misconduct was, that fees had been allowed to the solicitor for such copies, and for bespeaking the same, and to the Master, for making the same.

The time for showing cause against the order being enlarged, Mr. *Minchin* put in an answer, upon oath, on the 5th of *June*. As to the charges relating to the affidavits of service, he understood that the same, and the attendance thereon, had always been allowed without objection; and that if any objection had been made to the practice, he would have brought the same to the notice of the Court. As to the attendance on the warrants on leaving, which were alleged to be not attendable, he stated such warrants had been considered to be attendable, and had been attended, as any other warrants; and it had been the practice for a solicitor attending upon such a warrant, to receive on such attendance his copy of the paper left. And as to the attendance upon warrants to bring in papers, and which were alleged to be not attendable, he contended, that they were strictly attendable warrants; and with

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respect to copies of minutes, the subject of the two last distinct allegations, he denied he had received the sums of money charged in respect thereof; but finding such charges had been made by his predecessors in his office, and allowed without any objection, he had presumed that they were right and proper, and continued the same, and the same were inserted in the bill of costs presented to Mr. Justice *Burton*, for his final allowance in the cause of *Mootee Ram* v. *Campbell*; and he further stated that the copies had, in fact, been furnished to the solicitors up to the end of the year 1843; but in consequence of the severe illness of his chief clerk, the business of his office had in some degree fallen into arrear, and a portion of the subsequent minutes had not been actually furnished, and as that circumstance was not brought to his knowledge at the time of taxation, he was ignorant thereof, or he would not have allowed the same to be charged.

On the 11th of *June*, the Court made an order, reciting that, upon reading the order *nisi*, and the evidence upon which it was founded, and upon hearing the Counsel against the order, and upon reading the answer, sworn on the 5th of *June*, it appeared to the Court, that upon the several instances therein stated, Mr. *Minchin* had unlawfully acted, as therein mentioned. It was, therefore, ordered that Mr. *Minchin* be removed from his office of Master of the Court, for his misconduct as aforesaid, and the Court removed him from his office accordingly.

This was the order from which Mr. *Minchin* has appealed, and we are of opinion, and will so report to Her Majesty, that it ought to be reversed.

We undoubtedly consider it to be the duty of those who preside over the Courts and offices of justice, to

use their utmost vigilance and endeavours, to prevent any extortion upon suitors, and to take care that every fee or sum of money, which is sought to be received by the officers and solicitors, has a legal sanction for its receipt, and that no more than the sum legally sanctioned should be received; but in almost every Court it has happened that, in the progress of time, and unnoticed by the Court, the practice of receiving sums not legally sanctioned, but which in themselves are reasonable, and would have been sanctioned if duly noticed, has grown up, together with the practice of receiving sums which are both illegal and unreasonable, and which would have been forbidden if duly noticed. Such practice having been followed by one officer after another, who succeeded his immediate predecessor, becomes at length, in the absence of any reference to a duly established title, a sort of evidence of right, or supposed right, and the office is innocently accepted upon the notion, and on the reliance, that the right was established, by the usage which has been acquiesced in, and prevailed under the allocatur of the Judges.

Where a practice of this sort comes under observation, it is the duty of the Court to exercise, or procure the exercise of a legal authority to retrench fees, if not legal and reasonable, and to establish fees which may be reasonable and just, though not legal, until duly sanctioned. But in consideration of such circumstances, it ought to be carefully observed, that an officer, following the steps of his predecessor, may have received fees, which ought not to have been allowed, or continued, may, nevertheless, not be justly chargeable with any corruption or moral guilt.

In the present case, Mr. *Minchin* appears to have followed the example of those who went before him,

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and under circumstances which might reasonably lead him to think that the past allowance of such fees amounted to an authority to him, to allow, charge, and receive them. If they were improper, it was the duty of the Judges to prohibit the allowance of them for the future, but in the absence of misconduct by corruption, or disobedience proved, it does not appear to us to have been their duty to have dismissed Mr. *Minchin* from his office. The Judges, in the reasons which they assign for the order of the 11th of *June*, state, that the taking of the fees complained of, had been of long practice in the Master's office, and was traced up through numerous bills in Mr. *Minchin's* time, and to a period before he held the office.

The like observations might have been fairly made, upon the other matters complained of, and it appears to us, that there is no evidence before the Court, from which it could justly be inferred that Mr. *Minchin* was guilty of wilful corruption or fraud, or grave misconduct.

If there had been evidence to warrant such a conclusion, it would have been right to dismiss him from his office; but in the absence of such evidence, such fees as were improper, might have been prohibited or disallowed for the future, by proper authority; but we think no officer, who was allowed to take them in the circumstances in which Mr. *Minchin* was placed, ought to have been dismissed.

The Judges, in giving their reasons for the orders they made, have made use of expressions affecting the moral and personal character of Mr. *Minchin*, which we deeply regret, as we do not think they were warranted by the facts of the case.

Lord *Brougham*: It is to be distinctly understood,

that Mr. *Minchin* leaves the Court with his moral character perfectly untouched.

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RAM RUTTON RAE - - - *Appellant,*

AND

FURROOK-OON-NISSA BEGUM and ROOKYA BEGUM - - - } *Respondents.**

On Appeal from the Sudder Dewanny Adawlut, at Bengal.

17th & 19th Feb., 25th & 26th June, 1847.

A., being in possession of lands, as purchaser, under deeds of sale from B., the person last seised, was forcibly ousted from possession by C., and D., who set up a title to the lands, under an alleged deed of gift from B. A. made a complaint to the *Foujdarry* (Criminal) Court, and, under an order of that Court, was again put into possession; C. and D. being directed to institute a suit in the Civil Court, to establish their claim, which they accordingly did, relying upon their title, and impeaching the deeds of sale. In such circumstances, held by the Judicial Committee, reversing the decree of the *Sudder Dewanny Adawlut* of *Bengal* (without prejudice, however, to any question which might arise between A. and any other party claiming under B.), that it was incumbent on C. and D. to prove their right to the lands claimed, before they could put A. to proof of his title.

THE Respondents in this appeal were the Plaintiffs, in a suit instituted in the *Calcutta* Provincial Court, against the Appellant, for the purpose of recovering the possession of certain lands, consisting of 26 *beegas* and 15 *biswas*, and the buildings thereon, situate in the *Mouzas Beerpara* and *Kashipoor*, in *Punchawangaon*, in *Bengal*, then in the possession of the Appellant.

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

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The Respondents claimed the property in question, by the following title:—They alleged that 12 *beegas* and 8 *biswas* were formerly the property of one *Meer Sydoo*, a Mahomedan, of the *Sheea* sect, deceased. That he had two wives, *Noor Juhan* and *Zeena Begum*. By the first of these wives he had no children, but by the second he had two sons, named *Imdad Ali* and *Lootf Ali*. That upon his death, it descended on his two sons and heirs, *Imdad Ali* and *Lootf Ali*. That, upon the death of *Imdad Ali*, the Respondent, *Furrook-oon-nissa*, his widow, and *Lootf Ali*, his surviving brother, became his heirs; and that, upon the death of *Lootf Ali*, the right of property devolved on the Respondents. With respect to the residue of the property, namely, 14 *beegas* and 7 *biswas*, the Respondents admitted that it formerly belonged to *Noor Juhan*, but they alleged that she had by deed of gift, executed by her, given these 14 *beegas* and 7 *biswas* to *Imdad Ali* and *Lootf Ali*, then minors, and that from *Imdad Ali* and *Lootf Ali*, that portion of the property devolved, together with the 12 *beegas* and 8 *biswas* first mentioned, upon the Respondents. The Respondent *Furrook-oon-nissa* claimed under *Imdad Ali*, and the Respondent *Rookya* claimed under *Lootf Ali*. The Appellant claimed the whole property under certain deeds of sale, executed in his favour by *Noor Juhan*. He impeached the deed of gift relied on by the Respondents, as a forged and fabricated instrument, and as one which, if executed at all, was an imperfect donation, and had no legal force or validity, inasmuch as it was not accompanied by any transfer of the possession, and because it was indefinite in its terms.

The particulars of the lands were as follow:—16 *beegas* situate in *Mouza Kashipoor*, consisting of garden,

house, and tank; 16 *biswas* also situate in *Mouza Kashipoor*, inhabited by *ryots*; 8 *beegas* and 8 *biswas*, also situate in *Mouza Kashipoor* aforesaid, included in the *bazar*; 1 *beega* and 11 *biswas*, situate in *Mouza Beerpara*, occupied by *ryots*.

Of this property, it appeared that 19 *beegas* and 10 *biswas* formerly belonged to a Mr. *Thomas Moth*, deceased, of which 14 *beegas* and 7 *biswas* was *khiraji* land (land assessed to the Government revenue), and 5 *beegas* and 3 *biswas*, the residue thereof, was *lakhiraji* land (free from Government revenue). *Noor Juhan* was the mistress of *Moth*, and in or prior to the year 1805, he gave her 16 *beegas*, or thereabouts, part of the 19 *beegas* and 10 *biswas*, and he gave the residue thereof either to her, or to her mother, from whom it afterwards came to her.

Noor Juhan obtained a Government *pottah* in her own name, for the 14 *beegas* and 7 *biswas*, the *khiraji* portion of the lands.

The 1 *beega* and 11 *biswas*, situate in *Mouza Beerpara*, was purchased in the name of one *Meer Ghasi*, a nephew of *Noor Juhan*, from one *Gholam Hydur*, and was conveyed to him by a bill of sale, dated the 13th of *June* 1806.

After the connection between *Noor Juhan* and Mr. *Moth* had ceased, and subsequently to the date of the last-mentioned bill of sale, *Noor Juhan* married *Meer Sydoo*; and they continued to cohabit together till the time of his death, in the year 1825. During this period, *Meer Sydoo* assumed the management, and, in some respects, the ostensible ownership, of the property belonging to *Noor Juhan*.

In the year 1818, *Noor Juhan* and *Meer Sydoo* quarrelled, and she turned him out of her house; but, after

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being separated for about a year, they were reconciled, and again lived together. At that time, *Meer Sydoo* had living with him two sons, *Imdad Ali* and *Lootf Ali*, by his deceased wife, *Zeena Begum*, of the respective ages of seven and five years. Upon the occasion of their reconcilement, and on the 17th day of *October* 1819, it was alleged, that *Meer Sydoo* executed an *Ikrar-nama*, in reference to the lands and premises the property of *Noor Juhan*, in the following terms :—

"I, *Meer Sydoo*, inhabitant of *Kashipoor*, execute this *Ikrar-nama* to you, *Noor Juhan*. As the lady of Mr. *Moth*, you received from that gentleman, cash and jewellery, and a garden, (*khiraji*,) situated in *Kashipoor*, along the public road, consisting of 16 *beegas* of *khiraji* and 3 *beegas* of *la-khiraji* land ; a *pottah* of the *khiraji* land, the gentleman in question has caused to be drawn out in your name from the Collectorate ; and you have bought 1 *beega* and 11 *biswas* of land in *Mouza Beerpara* ; and shortly after your marriage with me you have purchased from your own money 5 *beegas* 14 *biswas* of land in *Kashipoor*, in my name, altogether 26 *beegas* and 15 *biswas* of land ; and you have at your own expense built *pukka* houses and *bazar* thereon, and have settled *ryots* thereupon ; and in consequence of your being a lady living in concealment, (that is to say, a virtuous, respectable woman,) I manage the business of the lands in question for you ; and now, as I have children from my other wife, you have grounds for suspicion : I therefore hereby declare, and give this writing in acknowledgment, that I or my sons from the other wife have no claims whatever on the 5 *beegas* and 14 *biswas* of land which you have bought in my name, and that I am the mere manager

of your property, in consequence of your being a *mokhuddura*, (lady respectable, living in concealment,) otherwise I have no right or interest in it whatever : the whole is your right and true title."

Noor Juhan continued in the possession or receipt of the rents and profits after the death of *Meer Sydoo*, till the month of *January* 1830, when she sold the property to the Appellant. At the death of *Meer Sydoo*, and previously to this sale, claims were set up to the property in dispute, on behalf of *Imdad Ali* and *Lootf Ali*, and the Respondent, *Furrook-oon-nissa*, as the widow of *Imdad Ali* ; and in the assertion of these claims, attempts were made to dispossess *Noor Juhan*. The ground taken in support of such claim was, that *Lootf Ali* and *Imdad Ali* were entitled, by right of inheritance derived from *Meer Sydoo* ; and, with a view to enforce them, various proceedings were instituted by these parties in the *Foujdarry* Court, but without success.

Noor Juhan, by a bill of sale, bearing date the 5th of *January* 1830, conveyed to the Appellant the garden, house, and tank, in *Mouza Kashipoor*, consisting of 16 *beegas*, and the 3 *beegas* and 10 *biswas* of land on which the *bazar* was first established, and the 1 *beega* and 11 *biswas* of land, situate in *Mouza Beerpara*, which was purchased in the name of *Meer Ghasi*, making altogether 21 *beegas* and 1 *biswa* of land. And by another bill of sale, dated the 9th of *January* 1830, *Noor Juhan* conveyed to the Appellant the 5 *beegas* and 14 *biswas* of the land purchased by her in the name of *Meer Sydoo*, aforesaid, being 4 *beegas* and 18 *biswas* of the 8 *beegas* and 8 *biswas* of land, forming the site of the *bazar*, and 16 *biswas* of the *Nundi* land.

Shortly after the execution of these bills of sale, and

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on the 6th of *February* 1830, *Noor Juhan* died. At her death, the Appellant applied to the Collector of *Calcutta*, for a Government *pottah*, in respect of the said *khiraji* portion of the property. The application was opposed by the Respondent, *Furrook-oon-nissa*, who then advanced a new ground of claim, alleging, for the first time, that *Noor Juhan* had never been in the possession or enjoyment of the property in dispute, since the death of *Meer Sydoo*, but had, in her life-time, by a *hibba-nama*, or deed of gift, bearing date the 13th of *December* 1817, given the property in question to *Lootf Ali* and *Imdad Ali*. The material part of this alleged deed purported to be as follows: "As you are the sons of my husband's wife, and I have no children, and you have lost your mother, and besides yourselves, neither I, nor my husband, *Meer Sydoo*, have any heirs, I, therefore, make a gift to you of all my property, real and personal, in my own name and in fictitious name:" and the deed then proceeded, "While I am living, my expenses will be defrayed from the profits of the gifted property."

Various inquiries were made and proceedings had in reference to the Appellant's application for a *pottah*, and on the 5th of *March* 1831, Mr. *C. Trower*, the Collector, ordered that a *pottah* should be granted to Appellant, leaving the objecting parties to seek redress by a civil action.

Upon the execution of the bills of sale by *Noor Juhan*, the Appellant had entered into the possession and receipt of the rents and profits of the property in dispute; but the Respondent, *Furrook-oon-nissa*, after the grant of the *pottah*, caused the Appellant to be cited in the *Foujdarry* (Criminal) Court, insisting upon their right, by virtue of the alleged deed of gift, of the 13th

of *December* 1817, in favour of *Lootf Ali* and *Imdad Ali*; but the magistrate of the *Foujdarry* Court, on the 19th of *May* 1831, decided that the land in dispute, being the lands and premises purchased by the Appellant, of *Noor Juhan*, should remain in the possession of the Appellant, and that the Plaintiff, in that proceeding, should be left to establish her claim by a suit in the Civil Court. From this decision an appeal was preferred to the circuit commissioner, who, on the 21st of *July* 1831, upon the hearing of the matter of the appeal, ordered that the decision of the magistrate of the *Foujdarry* Court should be affirmed.

On the 30th of *August* 1832, the Respondent, *Furrook-oon-nissa*, the widow of *Imdad Ali*, deceased, and *Rookya Begum*, the daughter of a deceased sister of *Meer Sydoo*, filed their petition of plaint, against the Appellant, in the *Calcutta* Provincial Court. By their plaint, the Respondents claimed to recover the property in question from the Appellant, and they therein referred, among other things, to the *hibba-nama*, or deed of gift, which, they alleged, had been executed by *Noor Juhan*, in favour of *Lootf Ali* and *Imdad Ali*; and they alleged that, by the deed of gift, and also by the *Furrais*, or Mahomedan Law of Inheritance, the whole estate of *Noor Juhan*, and that of *Meer Sydoo*, devolved on *Imdad Ali* and *Lootf Ali*, and after their demise devolved on the Respondents, *Furrook-oon-nissa* and *Rookya Begum*; and they further alleged that the Appellant had, through the bills of sale from *Noor Juhan*, which they alleged were forged, under the orders of the magistrate, possessed himself of the property, and appropriated to himself the profits thereof, and prayed to be put into possession, and to recover the mesne profits from the Appellant.

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To this plaint, the Appellant appeared and put in his answer, stating his own title, and denying the alleged title of the Respondent; and the Appellant also insisted that the Respondent, *Rookya Begum*, had shown no title whatever, and had no right to join as complainant in the suit.

Upon the abolition of the *Calcutta* Court, by Regulation V. of 1831, the suit was transferred to, and the proceedings afterwards carried on in, the Civil Court of the Twenty-four *Pergunnas*.

On the 28th of *September* 1836, the Judge of the Court, Mr. *E. R. Barwell*, pronounced the Court's decree, dismissing the suit with costs.

The Respondents appealed from this decree to the *Sudder Dewanny Adawlut*.

In the proceedings before the *Sudder Dewanny Adawlut*, it was alleged by a party who intervened in the suit, that the Respondents and their ancestors were of the *Imamia* faith, according to the tenets of which, an undefined gift was valid. With reference to this point, the Judge thought it necessary, before a decree could be made, to ascertain two points: 1st, whether the Respondents and their ancestors were of the *Sheea* or *Imamia* faith; and, 2ndly, through whom, and by what right, *Noor Juhan* collected the rents from the lands in dispute, up to the date of the bills of sale of the Appellant, and whether she held possession up to the date in question. Upon these points evidence was taken in the *Sudder* Court, and various documents adduced, and on the 21st of *September* 1840, Mr. *Warner*, the Judge, pronounced his opinion to be, that *Noor Juhan* was entitled only to what she had received by way of gift from Mr. *Moth*, viz., 14 *beegas* and 7 *biswas* of land,

mentioned in the *pottah* of the Collector; that the rest of the property belonged to *Meer Sydoo*; and that the deed of gift was ineffectual, because it was unaccompanied with possession; and after observing, that it did not appear from the proceedings how the Respondent, *Rookya Begum*, became heir to *Meer Sydoo*, or his sons, the Judge ordered, subject to the submission of the matters of the appeal to a second voice, that the claim and appeal of the Respondent, *Furrook-oon-nissa*, in the estate of *Meer Sydoo*, deceased, should be decreed to her by right of inheritance, and that the rest of her claim should be dismissed. On the appeal being brought before Mr. *T. B. Biscoe*, another Judge of the Court, he was of opinion, that the whole of the claim of the Respondents should be decreed to them, and that the decision of the Civil Court of the Twenty-four *Pergunnas*, should be reversed. This difference of opinion between the Judges of the *Sudder* Court, made it necessary to refer the matter to the consideration of a third Judge, which was accordingly done; and the third Judge, Mr. *D. Smyth*, on the 11th of *December* 1840, expressed his concurrence in the opinion of Mr. *Biscoe*, and it was finally ordered, that the appeal of the whole claim set forth by the Respondents should be decreed to them, and the decision of the Court of the Twenty-four *Pergunnas* cancelled.

From this decision the present appeal was brought.

Mr. *Kindersley*, Q.C., Mr. *Lloyd*, and Mr. *Fooks*, for the Appellant.

The Respondents, on whom lie the obligation and burthen of proof, (the Appellant being in possession under an order of the *Foujdarry* Court), have not established their title by sufficient evidence. The deed

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of gift, on which they rely, as the origin of their title, to part of the property in dispute, is at all events an ineffectual instrument, inasmuch as the gift thereby expressed to be made, was not accompanied by possession, and was indefinite in its terms. The Respondents have not established anything, beyond what they could claim by right of inheritance from *Meer Sydoo*.

Mr. *Turner*, Q.C., Mr. *Wigram*, Q.C., and Mr. *Busk*, for the Respondents.

The possession of the Appellant having been obtained by fraud, it was not competent to him to put the Respondents to proof of their title, and they were entitled to restitution of the lands, without proof of title. The title of the Respondents, however, to recover the land, was clearly proved, whether the property is treated as having belonged wholly to *Noor Juhan*, or as having belonged partly to *Noor Juhan*, and partly to *Meer Sydoo*.

They cited and referred to *Allen* v. *Rivington* (*a*). *Doe dem. Stephens* v. *Lord* (*b*). *Macnaghten's* Prin. of Mahomedan Law, pp. 206, 213, 230, 305.

In the course of the reply, Lord *Brougham* observed—

It appears that the proceedings which have taken place on the part of the Respondents, in turning the Appellant out of possession of the 14 *beegas*, 7 *biswas*, under the alleged deed of gift of 1817, by *Noor Juhan*, to the sons of *Meer Sydoo*, her husband, by a former wife,—that this forcible ouster, displacing and removing the Appellant, led to a proceeding in the

(*a*) 2 Saunders, 111. (*b*) 7 Ad. & Ell. 610.

Foujdarry Court, in the nature of a police proceeding, for restoring the possession to the Appellant, leaving the Respondents to proceed, as we should say in our Courts, "putting them to their ejectment," but in their own language, putting them to their plaint, in order to recover, as in an ejectment here, upon the strength of their own title. The *Foujdarry* Court only gave possession. The question, therefore, arises now upon the Respondents' title, which is put in issue by these proceedings. Their Lordships are of opinion, that the Respondents have failed in proving that title: it is needless to go into the proofs, as we are all satisfied that the deed of gift of 1817 was a fabricated instrument.

Now this decision against the Respondents refers to their title, as regards the 14 *beegas*, 7 *biswas*; it does not refer to the 2 *beegas*. These 2 *beegas* are clear of that consideration altogether, which may be brought within the same title, that is to say, the title of *Noor Juhan*, because the deed of gift is a general conveyance by *Noor Juhan*, of all her property. Whatever title the Respondents claim under that deed of gift of 1817, is, therefore, disposed of by a decision, *quoad* that; and the Appellant will be restored to that; leaving all questions open with regard to *Noor Juhan's* succession.

Mr. *Kindersley* having replied, the following judgment was delivered by

Lord BROUGHAM:

Their Lordships having thus disposed of the main point in this case, the claim of these parties, the sons of *Meer Sydoo*, deceased, or those representing them, their widows by the Mahomedan law being purchasers,

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under the deed of 1817, the alleged deed of gift of *Noor Juhan*; and being of opinion, that, looking to the evidence, there is, nevertheless, a right in the parties to come in and claim by inheritance, under *Noor Juhan*, it only remains to dispose of that part of the case which refers to the 12 *beegas*, 8 *biswas*, in the name of *Meer Sydoo*.

Now, it appears to their Lordships, upon the best consideration they have been able to give it, that they cannot consider the instrument of the 3rd of *July* 1824, (in which *Meer Sydoo*, in applying for a *pottah* in *Noor Juhan's* name, acknowledged that 5 *beegas* and 8 *biswas*, purchased in his name, was her property,) referred to in the order of Mr. *Trower*, the Collector of the district, on the same date, is a fabrication: we consider it is a genuine instrument. Mr. *Trower's*, an English officer's, name being forged, and no notice taken by the Court of such forgery, appears to be in the highest degree improbable, and is negatived, in the first place, by its great internal improbability, upon the absence of all notice or remark upon it, or proceeding taken in the Court below; and the instrument is supported by evidence of a disinterested and indifferent party, the very individual who drew and prepared the instrument.

Taking these things together, their Lordships entertain no doubt that they must give credit to it as an authentic instrument, and that puts an end to the case, with regard to the 5 *beegas* and 8 *biswas*.

Declare, therefore, that the Appellant having been put by the Court, in *India*, in possession of the property in dispute, and the Respondents having been directed to bring a civil suit to assert their claim to such property, and having brought this suit accord-

ingly, it was incumbent on the Respondents to prove some title to such land, before the Appellant was called upon to make out his title.

Declare, that it appears that the deed of gift set up by the Respondents, in favour of the sons of *Meer Sydoo*, is a fabricated deed, and that the Respondents have no title under that deed, to such property as belonged to *Noor Juhan*.

Declare, that as to the land in the name of *Meer Ghazi*, the Respondents have shown no title to such land.

Declare, that as to the 5 *beegas*, 8 *biswas*, in the name of *Meer Sydoo*, they appear to have been purchased on account of *Noor Juhan*.

Reverse, therefore, the decree complained of; restore the possession to the Appellant, but declare, that this order is entirely without prejudice to any question as to the validity of the deeds under which the Appellant claims, as between him and any person claiming under *Noor Juhan*.

MUSSUMAT GOLAB KOONWUR, SHEO RUTTUN SING, SHEO UMMUR SING, and KAMPTA PERSAD SING - - } *Appellants*,

AND

THE COLLECTOR OF BENARES, and RAJA OODIT NARAIN SING - - } *Respondents.**

On Appeal from the Sudder Dewanny Court of Bengal.

24th & 25th June 1847.

A., the proprietor of large ancestral and other estates in *Benares*, died, leaving a widow and four sons. Shortly after A's. death, three of the brothers became implicated in a rebellion against the State. The fourth brother, then a minor, was not concerned in the rebellion. At the suppression of the rebellion, Government issued proclamations for the parties severally to appear and answer the charges against them; but they absconded: the Government thereupon, acting under the provisions of *Bengal* Reg. XI. of 1796, confiscated the whole of their property, including the ancestral estates, formerly held by A.

Held on appeal, that such confiscation was regular, and within the meaning of the Regulation, but that the act of Government which divested the three sons of their right and interest in the estates, did not affect the rights of the fourth son, who was entitled to his share in all the ancestral estates of A., taken by the Government, under the forfeiture; and

Held also, that the forfeiture did not affect the rights of A.'s widow, and that she was entitled to maintenance, out of the whole of the estate that was ancestral.

THIS was an appeal from a final decision of the *Sudder Dewanny* Court of *Bengal*, made in a suit instituted by the Appellant, *Mussumat Golab Koonwur*, against the Collector of *Benares*, and *Raja Oodit Narain Sing*, for the restitution of certain *malguzary* and *mahf* property in *Pergunnas Kole-Usla*, *Narainpore*, and *Tutwaree*, consisting of various lands named *Fut-*

* Present: Members of the *Judicial Committee*,—Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

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tehpore, &c., formerly the property of her deceased husband, *Ujaib Sing*, and subsequently of his son, *Sheo Pursan Sing*, which had been seized and confiscated by the Government, under the provisions of *Bengal* Regulation XI. of 1796; *Sheo Pursan Sing* and his brothers, *Sheo Ruttun Sing* and *Sheo Ummur Sing*, having been engaged in the rebellion in *Benares*, under *Vizier Ali*, in the year 1799.

The material facts of the case, and the questions raised by the appeal, are fully stated in the judgment of their Lordships.

The case was argued by

Mr. *Buller*, Q.C., Mr. *Jackson*, and Mr. *Forsyth*, for the Appellants; and

Mr. *Wigram*, Q.C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Collector of *Benares*, and *Raja Oodit Narain Sing*.

The following authorities were cited and referred to.

As to the Appellant's, *Mussumat Golab Koonwur's*, right, by the Hindoo Law, to maintenance out of her deceased husband's estates. *Mussumaut Bheeloo* v. *Phool Chund* (*a*). *Rungama* v. *Atchama* (*b*). 1 *Strange's* Hindoo Law, (2nd Edit.) 121.

Upon the question of the brothers being an undivided Hindoo family. 1 *Strange's* Hindoo Law, (2nd Edit.) p. 17, 18, 199.

The Right Hon. T. PEMBERTON LEIGH:

17th Dec. 1847.

The suit, in this case, was brought for the recovery

(*a*) 3 Ben. Sud. Dew. Rep., 223.

(*b*) 4 Moore's Ind. App. Cases, 1 & 112.

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of large estates in the province of *Benares*, which had been seized by the East India Company, on the ground of a forfeiture, alleged to have been committed by the owners.

The Appellants, who claim the estates, are the widow and three surviving sons of *Ujaib Sing*. The Respondents are the Collector of *Benares*, defending the suit on behalf of the Company, and *Raja Oodit Narain Sing*, to whom a part of the confiscated property has been granted.

Ujaib Sing appears to have held under different grants, from the *Raja* of *Benares*, very extensive estates. These estates, or a great part of them, were, in his lifetime, re-granted to his eldest son, *Sheo Pursan Sing*.

In 1786, *Ujaib Sing* died, leaving the Appellant, *Mussumat Golab Sing*, his widow, and *Sheo Pursan Sing*, and the Appellants *Sheo Ruttun Sing*, *Sheo Ummur Sing*, and *Kampta Persad Sing*, his four sons, surviving him.

In 1799, an insurrection broke out in *Benares*, in which the three eldest sons of *Ujaib Sing* were accused of being implicated; the fourth, *Kampta Persad*, being then a minor. The supposed delinquents were summoned to appear and answer the charge against them, but they absconded, and could not be found. After certain proceedings had taken place, the regularity of which is disputed by the Appellants, an order was pronounced by the Governor-General in Council, on the 30th *January* 1800, declaring the estates of *Sheo Pursan Sing*, *Sheo Ruttun Sing*, and *Sheo Ummur Sing*, to be forfeited, and directing the Collector of *Benares* to hold them, subject to the disposal of the Government.

Under this order, all the estates held in the name of *Sheo Persad Sing* were confiscated. A portion, consisting of the *pergunna* of *Kole-Usla*, was granted to *Rany Golab Koonwur*, for her life, subject to a heavy mortgage made by *Sheo Pursan Sing*; and on the death of the *Rany*, in 1805, this part of the property was granted, on the same terms, to her son, the Respondent, *Raja Oodit Narain Sing*.

In 1803, the Appellant, *Mussumat Golab Koonwur*, presented a petition to the Governor-General, for a restoration to her, of the confiscated estates, which she alleged to be her hereditary property. She was referred by the Governor-General to the Courts of Law, for the establishment of any claim which she might have.

In 1810, with the sanction of the East India Company, she filed, in the Provincial Court of *Benares*, the plaint, which is the foundation of the present proceedings. This plaint stated the whole of the confiscated property to have been the ancestral property of her late husband, *Ujaib Sing*, though transferred into the name of *Sheo Pursan Sing*, his eldest son, and to have been enjoyed, after the death of *Ujaib Sing*, by the Plaintiff and her sons, and prayed that it might be restored to the Plaintiff.

It does not appear that the other Appellants ever became formal parties to this suit, though they seem, from time to time, to have concurred with the Plaintiff, in presenting petitions to the Court, in incidental matters.

The Defendants relied upon their title, under the order of confiscation; and after a variety of proceedings, not necessary to be stated, the case came, on the 15th of *August* 1816, to be heard before Mr. *Courtney Smith*.

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Mr. *Courtney Smith* appears to have considered that the confiscation was founded on acts of rebellion, supposed to have been committed by the sons of *Ujaib Sing*, and as no proof of any such acts was to be found, he was of opinion that the confiscation was entirely illegal. He held that the whole property was to be considered as belonging to the widow and sons of *Ujaib Sing*, and he decreed that it should be restored to them accordingly.

It is obvious that, at this time, the real nature of the case was not understood. The confiscation was not founded on any supposed act of rebellion, but on the failure of parties summoned to appear, to come in under the summons, and which failure was alleged to empower the Government, under the terms of the Regulation, after stated, to declare a forfeiture.

It may be observed, that even if the foundation of the decree had been sound, it was very singular in form; for supposing the property to have belonged to the sons of *Ujaib Sing*, not one of them was a party to the suit: it did not appear whether *Sheo Pursan Sing* was alive or dead, and the decree was made at the instance of a party who had no title, in favour of persons who, if they had a title, were not parties.

We advert to the form of the proceedings, not because our judgment will at all turn upon it, but because it will be found material, with reference to one of the points urged before us, at the hearing.

From this decree, there was an appeal to the *Sudder* Court, both by the Collector and the *Raja*.

The Collector, in his petition of appeal, did not object to the decree, so far as it restored to *Kampta Persad* any property belonging to him, but it required

that what did properly belong to him should be ascertained.

Although the three sons of *Ujaib Sing* were not parties to the original suit, they became parties to both appeals, and put in joint answers with their mother, *Mussumat Golab Koonwur*. In both these documents, all the property in dispute is claimed as ancestral property, which had come from *Ujaib Sing*.

In the course of the proceedings in the appeal, the points on which the confiscation had proceeded were further investigated. Additional evidence was produced, and the nature of the title, under which the various portions of the disputed property had been held, at the time of the confiscation, was examined, and, on the 9th of *November* 1819, the decree of the *Sudder* Court, now appealed from, was pronounced. By this decree, the Court reversed the judgment of the inferior Court, and, holding the confiscation to be valid, decided that it took effect as to all the estate and interest which *Sheo Pursan Sing*, *Sheo Ruttun Sing*, and *Sheo Ummur Sing*, had in the property; and it then proceeded to declare, in what parts of the property *Kampta Persad Sing* was to be held to have an interest, and directed such property to be restored to him, but it took no notice of the right of *Mussumat Golab Koonwur* to maintenance, a right which does not appear, from the proceedings, to have been adverted to.

From this decree, the present appeal is brought.

It has been contended before us by the Appellants,—

First. That the Government had no authority to pronounce a sentence of forfeiture, in this case, even if all necessary forms had been observed.

Second. That all necessary forms were not observed.

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Third. That if the sentence were valid, the forfeiture would enure for the benefit, not of the Government, but of *Kampta Persad Sing*.

Fourth. That all the property in the name of *Sheo Pursan Sing* might have been treated as ancestral property.

Fifth. That if not, the four brothers constituted an undivided family, and that all the acquisitions of *Sheo Pursan Sing* would be part of the joint stock. And

Lastly. That, at all events, *Mussumat Golab Koonwur* was entitled to maintenance, out of the whole of the property of *Ujaib Sing*.

The first question depends on the Regulation XI. of 1796.

That Regulation provides for two cases,—First, resistance to process of the Court; Second, for cases of persons charged with offences of a criminal nature, who shall abscond or conceal themselves, so that upon process issued against them they cannot be found.

The present case comes within the second class.

The provisions are in substance, that, in such cases, proclamations shall be issued by the magistrates, requiring the absent party to appear to answer the charge, within a period not less than a month: in default of appearance, if the absentee be a proprietor, paying revenue immediately to the Government, the magistrate is to order the attachment of any lands of the absentees, within his jurisdiction, by issuing his precept to the Collector of the district, directing him to attach the lands, and hold them till further notice.

Then follows the sixth and last clause, which is in these words:—"Should the absentee neglect to attend, after a period of six months after the lands have been ordered under attachment, the magistrate is to report

the case to the Governor-General in Council, who will pass such order upon it, and upon the future disposal of the lands, as he may judge proper."

No words can be more general and extensive than these; but it was argued, that they could not be intended to include a forfeiture or confiscation of the lands, because in the other case provided for by the Regulation, viz., that of resistance to process, forfeiture of the lands is expressly enacted.

The two cases are obviously very different; but it will be found, on examination, that the terms of the enactment, applicable to the first case, confirm the construction which we put upon the clause now in question.

In case of resistance to process, the magistrate is to declare the forfeiture, but that sentence is to be reviewed by the *Nizamut Adawlut*, which may either confirm or modify it; if confirmed, the proceedings are to be transmitted before the sentence is carried into execution, to the Governor-General in Council, who will finally determine whether the sentence of forfeiture shall be put in force, or commuted to a fine, or otherwise, and who, whenever he may order the land or lease of the offender to be forfeited to Government, will, at the same time, cause the necessary instructions, for the future disposal of the land, to be conveyed to the Collector through the Board of Revenue.

These words are substantially the same as those of the sixth section.

We have no doubt, therefore, of the right of the Governor-General in Council to pronounce an order of confiscation, in such cases as the present.

II. It is said that the proceedings were irregular.

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Now, it is not disputed that process was issued against the parties; that they absconded; that their lands were attached by the Collector, under an order from the magistrate; that six months elapsed without their appearance; that the case was reported to the Governor-General in Council; that a sentence of forfeiture was pronounced. But it is contended, that the attachment ought only to have issued after certain proclamations had been made, in a particular form, and with certain ceremonies; and that there is no evidence that those forms and ceremonies were strictly observed. We are of opinion, that after the issuing of the attachment by the Court, and the subsequent declaration of forfeiture, we must presume all things previous to the attachment to have been regularly and legally done, and that there is no sufficient evidence to rebut that presumption. It is unnecessary, therefore, to consider what might have been the effect of any such irregularity, if it had been proved to exist.

III. The next proposition of the Appellants was a very singular one, viz., that the forfeiture declared against three of the brothers should enure for the benefit of the fourth, in direct opposition, both to the letter and spirit of the Regulation, which declares that the forfeited lands shall be at the disposal of the Governor-General in Council. Neither principle nor authority was advanced in support of such a proposition, and it is obvious that it cannot be maintained.

An opposite view of the subject appears to have been suggested by the Commissioners of forfeited estates, in the course of these proceedings, viz., that when the Government had made grants to individuals, as in this case to *Sheo Pursan Sing*, the whole property granted to him by the Government ought to be held forfeited

by his delinquency, without regard to the rights of participation in the property which might belong to members of his family.

No such question, however, has been raised in the course of these proceedings: on the contrary, the decree affirming the rights of *Kampta Persad*, as far as his share is concerned, is not objected to. The question, therefore, is not before us.

The next point for consideration is, whether the decree has given to *Kampta Persad* all that he was entitled to, assuming his interests to be unaffected by the forfeiture.

The decree proceeds on the principle of giving him all that appears to have been held in his own name, and one-fourth of all the Court considered to be the ancestral property of the family; to have come, in short, from *Ujaib Sing*.

It is said that he ought to have had one-fourth of all that was held in the name of *Sheo Pursan*. First, because all should have been treated as ancestral; Secondly, because, at all events, the brothers constituted an undivided family, and, therefore, he was entitled to a share of the whole, whether ancestral or not.

Upon the second point, it may be sufficient to observe, that no such case is made in any part of the proceedings. The suit in which the present appeal is brought, was instituted by *Mussumat Golab Koonwur* alone, claiming the property which had belonged to *Ujaib Sing*, and that case is adopted by the other Appellants, when they became parties to the proceedings. No other title is set up, and *Kampta Persad* takes, under this decree, the whole of the estate held by him in his own name.

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The question then is, whether the decree ought to have treated as ancestral property, the whole of what was granted to *Sheo Pursan Sing*, or a larger portion of it than is actually so treated.

These are questions on which it is scarcely possible for this Court to come to a very satisfactory conclusion, for it depends upon the usage prevalent in the country, and the inferences to be drawn from documents, naturally informal, and in which it is very difficult to trace the identity of the property. In some of these documents, the grant is made to *Ujaib Sing*, in others to *Ujaib Sing* and his children, or, with other words, indicating a continuance of the estate in his family, after his death. In some of them, property is granted to *Sheo Pursan Sing*, or *Sheo Pursan Sing* and his children, which never appears to have been held by *Ujaib Sing* at all.

The grant being in the name of *Sheo Pursan Sing* (who appears alone so far to have dealt with a large portion of it, *Pergunna Kole-Usla*, as to mortgage it in his own name), it is for *Kampta Persad Sing* to make out his title to a share of any portion which he claims. The Court below appears to have held, that the mere circumstance of property which had been held by *Ujaib Sing*, and, in some instances, by preceding members of his family, being afterwards transferred, by a renewal grant in his lifetime, to *Sheo Pursan Sing*, was not sufficient to evidence an hereditary interest, especially when the *jumma*, or rent, reserved to the Government, had, from time to time, varied, but that when the grant, originally to *Ujaib Sing*, was in terms which showed that it was to continue in his family after his death, the property must be treated as ancestral.

We are not prepared to say that this principle is

erroneous, and we have carefully looked through the whole of the evidence, in this case, in order to see whether it appeared, in any instance, to have been misapplied.

The judgment, in this case, has been delayed, in order to afford us the opportunity of making this examination, and not from any doubt which we entertained at the hearing, on the points of law.

There is one portion of property, and one only, which, upon this investigation, it appears to us, ought to have been included in the ancestral estate, viz., *Futtehpore*.

The case appears to stand thus :—

The title depends upon two documents, nearly contemporaneous. One a *Sunnud*, from the *Raja* of *Benares*, dated the 17th *July* 1785, the provisions of which are, " Be it known to the present and future *Mutsuddies*, for the affairs of the *Amlah* of *Pergunna Kole*, situate in *Sircar Jaunpore*," and so on, " that as *Mouza Futtehpore*, appertaining to the aforesaid *Pergunna* (*Kharijjumma*), with the exception of the revenues of the *Sircar*, together with the *Sayer*, is in the name of *Thakoor Burriar Sing*, *Marj* of old, therefore, upon the former rule, the same has been rendered *Marj*, in favour of my friend *Baboo Ujaib Sing*, you are desired not to molest the said *Baboo* in any way whatever, as respects the aforementioned *Mouza*, but to leave it to the enjoyment of the said *Baboo*, and you shall not demand a fresh *Sunnud* for him annually." The other document. is a *Sunnud* from the Collector of *Benares*, dated the 16th of *September* 1785, in these words :— " As the village of *Futtehpore*, in the above *Pergunna*, has been formally granted, as *Mahfy* to the deceased, *Thakoor Burriar Sing*; considering, therefore, the

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rights of *Baboo Ujaib Sing*, as heir to the above *Thakoor*, the above villages is to be considered as formerly *Mahfy* to the above *Baboo*, his heirs, and descendants, for ever."

As against the East India Company, and those claiming under them, we think that these documents are quite sufficient to establish, that this property was hereditary in the family of *Ujaib Sing*.

The only other question is, the right of *Mussumat Golab Koonwur* to maintenance out of the whole of the property held to be ancestral.

Nothing was urged at the bar against this right; and it appears to us that, on the principle of the decree, it ought to have been recognized.

Upon the whole, we shall humbly report to Her Majesty our advice, that the decree complained of should be varied, by declaring that the village of *Futtehpore* ought to have been treated as ancestral property, and included as such in the estates, of which one-fourth part is, by the decree, allotted to *Kampta Persad*, and that *Mussumat Golab Koonwur* ought to have been declared entitled to maintenance out of the whole of the ancestral property, and that the case should be remitted to the Court below, with directions to give effect to the above declarations, and that the decree complained of should, in other respects, be affirmed, without costs.

RANY PUDMAVATI - - - - *Appellant*,

AND

BABOO DOOLAR SING and others - *Respondents*.*

On Appeal from the Sudder Dewanny Adawlut of Bengal.

29th & 30th June 1847.

The title to land in *Poornea*, being in dispute, upon the question, whether the *Mythila* or *Nuddea* law was to regulate the succession, the test to be applied is, the form and character of the religious rites and ceremonies, and the usages of the family.

Where, therefore, a family of *Bengali Soodra Sutgops*, who had migrated, at a remote period, from the south-west of *Bengal*, where the *Nuddea* law prevailed, to the district of *Poornea*, where the *Mythila* law was in force, and had adopted and performed their religious rites and ceremonies, according to the law of *Mythila*,—it was held by the Judicial Committee, affirming the decree of the *Sudder* Court, that the *Mythila* law, in such case, must govern the right of succession.

THE question in this case was one of family usage and custom. The parties were members of a family of *Bengali Soodra Sutgops*, which had migrated, at a remote period, from the district of *Burdwan*, in the south-western part of *Bengal*, to the district of *Poornea*; and the main point raised, was whether the law in force in *Mythila*, or the law prevailing in *Bengal*, was to govern the rights of succession and distribution among the respective parties to the appeal, to the *pergunna Powa Khalee*, and other property, situate in *Poornea*, in the north of the province of *Bengal*.

It appeared that previous to the year 1738, one *Ghureeb Das* was in possession of the *pergunna Powa Khalee*; *Ghureeb Das* had five sons, viz. *Huree Sing*,

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

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Jye Sing, *Run Sing*, *Bhao Sing*, and *Achal Sing*. At his decease, his eldest son, *Huree Sing*, according to a customary right of primogeniture, succeeded to the *Zemindary*, and continued in possession thereof, until the year 1803 when his son *Sobhe Kurun Sing* was put into possession of the *Zemindary*, and his name enrolled as proprietor thereof; *Sobhe Kurun Sing* survived his father *Huree Sing*, and died in the year 1813, leaving two sons, *Pohput Sing* and *Rung Lal Sing*, minors, his heirs. *Pohput Sing*, upon obtaining his majority, took possession of the *Zemindary*, and the original custom of primogeniture having, by Regulation XI. of 1793, been abolished, procured his name, together with that of his brother, *Rung Lal Sing*, to be entered on the Government records, as joint proprietors of the *Zemindary*. *Pohput Sing* died in the *Moolki* year 1227 (1819-20, A.D.) without issue, leaving the Appellant, *Rany Pudmavati*, his widow, him surviving. Immediately on the decease of his brother, *Rung Lal Sing* took possession of the *Zemindary*, and after presenting a petition to the Collector, in which he claimed the entire *Zemindary*, was registered as the sole owner thereof, the affairs of which he managed until the 5th of *January* 1825, when he died, unmarried and without issue, leaving the Respondent *Doolar Sing* and others, according to the *Mythila* law, and the custom and usage of the family, his heirs at law.

The Appellant, at *Rung Lal Sing's* death, set up a claim to the *Zemindary* and other real and personal estate of *Rung Lal Sing*, by virtue of an instrument, in the nature of a Will, bearing date the 7th of *January* 1825, purporting to have been executed by him in her favour, one day previous to his decease. This instrument recited, that she was entitled, in right

of her husband, to one moiety of the whole property, and it then devised to her the other moiety. Under the colour of this Will, she obtained possession of the *Zemindary*, and after the examination of some of the witnesses to this alleged Will, before the Collector, got her name recorded as owner. The proceedings before the Collector were *ex parte*.

The Respondents, *Doolar Sing*, *Mahtub Sing*, *Balubh Sing*, *Rumun Sing*, *Bussunt Sing*, sons of *Achal Sing*, then petitioned the Judge and Collector of the district where the property in dispute was situate, for possession of the *Zemindary*, impeaching the Will as a forgery, and praying for the appointment of a manager. They were referred to the Civil Courts for redress.

Accordingly, on the 13th of *September* 1826, *Doolar Sing*, together with his five brothers, the sons of *Achal Sing*, instituted a suit in the Provincial Court of *Moorshedabad*, against *Rany Pudmavati* and others. The plaint, after stating the complainant's descent from the common ancestor, *Ghureeb Sing*, and stating that they were, according to the Hindoo law, and custom of the family of the deceased *Rung Lal Sing*, the rightful proprietors of the *Zemindary*; and after repudiating the alleged Will, prayed that they might be put in possession of the whole of the revenue and rent-free lands of the deceased *Rung Lal Sing*, which they assessed at Rs. 135,354. 12a. 3g. 3p.

In this suit, *Imrut Lal*, *Chirurjee Lal*, and others, who claimed to be the descendants of *Huree Sing*, through females, and as such, to be the heirs of *Rung Lal Sing*, and *Arjoon Sing* and *Tilsa Sing*, the sons of *Run Sing* and *Bhao Sing*, claiming to be co-sharers with the original Plaintiffs, in the property in dispute, were afterwards added as Defendants.

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Rany Pudmavati put in her answer, on the 29th of *January* 1828, in which she traversed generally the allegations contained in the plaint, and denied that the *Zemindary* was acquired by *Ghureeb Das*, and insisted that the *Zemindary* of *Powa Khalee* was acquired by *Huree Sing*, which had descended to her husband from her brother-in-law, and after their death, to her; that after her husband's death, she lived in undivided partnership with *Rung Lal Sing*; and submitted that the Plaintiffs' claim was barred by the Regulations of Limitation (sec. xiv. Reg. III. of 1793, sec. iii. Reg. II. of 1805); she moreover insisted on the validity of the alleged Will, under sec. vi. Reg. XI. of 1793, and claimed possession and inheritance by virtue thereof, and alleged that the deceased *Rung Lal Sing* had authorized her to adopt a son, which she had done.

After the usual pleadings, both parties entered into evidence. The Appellant filed documentary proofs, consisting of the proceedings taken before the Collector, relating to the transfer of the *Zemindary* to *Rany Pudmavati*, under the alleged Will of *Rung Lal Sing*, together with the depositions of the witnesses to the Will, taken before the Collector.

On the 16th of *March* 1829, the Provincial Court of *Moorshedabad* made its decree in the cause, which, after setting forth at length the pleadings in the suit, proceeded thus:—"It appears that the *Zemindary* of *pergunna Powa Khalee*, &c., was the right of *Huree Sing*, that he was in possession of it without the participation or opposition of any one; that he had, before his death, excluded his own name, and continued the name of *Sobhe Kurun Sing*, his son, over the *Zemindary*, and then died; that his son possessed it in the

lifetime of his father, and acquired *Chuk Dilawuri* and other lands after his death. *Pohput Sing*, husband of the Defendant, and *Rung Lal Sing*, his two sons, had possession of it. *Pohput Sing* died without issue, leaving the Defendant and *Rung Lal Sing*; after his death, the property in dispute came into the possession of *Rung Lal Sing* and *Pudmavati*. After the death of *Rung Lal Sing*, *Pudmavati* got possession, by a Will of *Rung Lal Sing* in her favour, of his estate, and of her husband's by heirship. In consideration of these circumstances, and as the Plaintiffs, or their father, were never in possession of the *Zemindary* in dispute, or of any share of it, and from the date of the deed in the name of *Huree Sing*, the 10th of *April* 1780, to the institution of this suit, forty-six years have elapsed, during which time the *Zemindary* was in the possession of *Huree Sing* and his heirs, without the participation or opposition of any one; and as no proof has been adduced that the whole *Zemindary* was first in the possession of *Huree Sing*, with the permission of *Achal Sing* and his other brothers, and their heirs, and it then came after his death into the possession of *Sobhe Kurun Sing*, and after his death into that of *Pohput Sing* and *Rung Lal Sing*, the claim of Plaintiffs cannot be heard under sec. iii. Regulation II. of 1805. Moreover, the silence of *Achal Sing*, father of the Plaintiffs, and his brothers, and their heirs, without any claim for a share or part of the *Zemindary*, is a proof of their want of right to it. If the Will of *Rung Lal Sing* did not exist, or were invalid, in favour of *Pudmavati*, as there are existing *Indravati* and *Gyanpati*, daughters of *Sobhe Kurun Sing*, and full sisters of *Pohput Sing* and *Rung Lal Sing*, and *Indravati* has three sons, the Plaintiffs cannot, by the Hindoo

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law, have any right to the share of *Rung Lal Sing*. For the reasons aforesaid, the claim of the Plaintiffs is entirely unfounded, and cannot, under the Regulations, be heard or tried by the Court." It was, therefore, ordered, that the suit be dismissed with costs.

The Respondents appealed from this decree, to the *Sudder Dewanny Adawlut* at *Calcutta*, and in support of their title to succeed to the *Zemindary* in dispute, they relied upon the law of *Mythila*. The allegation respecting this law was not then denied by the Appellant, upon which the Court thought it necessary to inquire which of the parties was entitled, by the *Mythila* law, to the estate of *Rung Lal Sing*, and it was ordered, therefore, that a copy of the proceedings be laid before the Hindoo law-officer of the Court, to answer this question:—" The *Zemindary* in dispute having descended from *Huree Sing* to *Sobhe Kurun Sing*, his son, and, after his death, to *Pohput Sing*, his eldest son, and, after his death, to *Rung Lal Sing*, his younger son, without partition, after which *Rung Lal Sing* died unmarried and without issue, and the Plaintiffs, being the sons of *Achal Sing*; and *Arjoon Sing*, the son of *Run Sing*, and *Tilsa Sing*, the son of *Bhao Sing*, son of *Ghureeb Das*; and brother of *Huree Sing*; and *Pudmavati*, the widow of *Pohput Sing*; and *Opindur Lal*, *Dya Lal*, *Ghirdharee Lal*, *Prem Lal*, *Chung Lal*, daughter's sons of *Sobhe Kurun Sing*, his brother; which of these should get the estate of *Rung Lal Sing*, by the law current in the country of *Mythila*?"

The law-officer of the Court, by his *bewusta*, bearing date the 3rd of *April* 1833, was of opinion, " that if there was no one descended from son to son, of the grandfather of the grandfather of *Rung Lal Sing*, deceased; that is to say, to the son of *Ghureeb Das*, de-

ceased; then the estate of *Rung Lal Sing* would go to the sons' sons of *Ghureeb Das*, the Plaintiffs, and others mentioned in the question of the Judge, the sons' sons of the grandfather of the grandfather of *Rung Lal Sing* (or, in other words, if there were no sons of *Ghureeb Das* still living, the estate would go to the sons' sons of *Ghureeb Das*). *Pudmavati*, the widow of the elder brother of *Rung Lal Sing*, is entitled, for her life, to her expenses of food and clothing, religious ceremonies, and necessary duties of a widow, according to the family usage of her husband." This opinion was given according to the authorities received in *Mythila*.

After the receipt of this opinion, the Defendant, for the first time, set up as a defence to the claim of the Plaintiffs, that the Hindoo law of *Nuddea* was current in *Rung Lal Sing's* family, and insisted that such law should govern the question at issue between her and the Plaintiffs. This fact was denied by the Plaintiffs, upon which, after some further inquiries, the *Sudder Dewanny Adawlut*, on the 9th of *May* 1833, recorded its opinion, in substance, as follows:—That the Will produced by the Defendant was not correct or credible, and that, by the opinion of the Hindoo law-officer of the Court, it appeared, that the estate of *Rung Lal Sing* descended to the Plaintiffs, by the Hindoo law current in the country of *Mythila*, and that the Defendant was entitled to the expenses of her support and religious ceremonies, according to the usages of the family; but that, as the Defendant had alleged that the Hindoo law of *Nuddea* was current in the family of *Rung Lal Sing*, and as it had not been proved by the papers in the cause, or any inquiries made in the Provincial Court, whether the Hindoo law of *Mythila*, or *Nuddea*, was current in the family of

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Rung Lal Sing, the Court was of opinion, that the decision of the Provincial Court, dated the 16th of *March* 1829, was imperfect, and, therefore, ordered, "That a copy of this proceeding be sent, with a precept unlimited, to the Judges of the *Moorshedabad* Provincial Court, with the papers of the case, directing them to restore the case to its former number; to ascertain whether the festival and funeral ceremonies of the family of the Plaintiffs, and *Rung Lal Sing*, are performed according to the *Mythila*, or *Nuddea*, Hindoo law, by the evidence of witnesses, nominated by both parties, especially the spiritual guides and family priests, and others of the same tribe, of both parties, and by documents filed by both parties, in such a manner as it may be clearly proved, that the festival and funeral ceremonies of the family of *Rung Lal Sing*, and his ancestors, were performed according to the *Mythila* Hindoo law, and to decide the case regularly, according to the legal opinion of the law-officer of this Court, and by calling for a legal opinion of the *Nuddea* law."

The suit was remitted to the Provincial Court of *Moorshedabad*; but that Court having been abolished by Regulation II. of 1833, the suit was transferred to the Civil Court of *Poornea*, before which Court evidence was entered into on both sides.

The Plaintiffs examined witnesses, consisting of the spiritual guides and priests, and relations of the family, and others, who deposed to the performance of religious ceremonies, according to the *Mythila* law. The particular forms and ceremonies are more particularly referred to, and set forth, in the questions subsequently put by the Court, to ascertain their character, whether they were *Mythilean* or *Bengal* customs. The Defend-

ant, on the other hand, produced and examined numerous witnesses, to prove that the usages and customs of the family were in accordance with, and in conformity to, the requisitions of the *Nuddea* law. The Plaintiffs, also, produced some documentary evidence, consisting of opinions and proceedings taken in other suits.

The pleadings, with the evidence taken on the rehearing, came on before Mr. *H. Nisbett*, the Judge of the Civil Court of *Poornea*, and, on the 7th of *February* 1835, that Judge pronounced the decree of the Court, which, after setting forth the matters at issue in the cause, proceeded thus:—"In my opinion, the object of the Plaintiffs, that is, their allegation that both parties followed the law of the *Mythila* country, in their marriages, funerals, and other rites, has not at all been proved; and it is clear, from the depositions of all the witnesses, that both parties are of tribes natives of *Bengal*, and their customs and usages are according to those of the people of *Bengal*, and their connections by marriage, and otherwise, are people of *Bengali* tribes. Both parties agree, that those of their own tribe residing at *Kunchia*, in this district, follow the *Nuddea* law, and *Bengal* customs, and they have a *Bengali Brahmin* for their family priest, and the marriages of many of both parties took place among them:" and he, therefore, ordered, that the suit of the Plaintiffs be dismissed, with costs.

From this decision, the Plaintiffs appealed to the *Sudder Dewanny Adawlut*, at *Calcutta*; and, on the 29th of *June* 1835, filed their pleas of appeal, insisting that the decree of the Court below was erroneous, and against the evidence in the cause.

Further documentary evidence was produced by both sides.

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The proceedings in the appeal were brought, in the first instance, before Mr. *C. Harding*, the officiating Judge, who, before pronouncing any opinion upon the merits, thought it proper to make inquiry concerning the marriage and funeral customs deposed to, by the witnesses of both parties; and the pleaders of both parties having been questioned upon the subject, they agreed, on the part of their clients, to refer the inquiry concerning these matters, to the Hindoo law-officer attached to the Court.

Accordingly, on the 15th of *January* 1838, it was ordered, that a copy of the depositions of the witnesses of both parties be sent to the Hindoo law-officer of the Court, with an order to make a full report, in two weeks, whether the statements of the witnesses of the Plaintiffs, regarding the marriage and funeral customs of both parties, being according to the *Mythila* law, might be understood also of the *Nuddea* law, and similarly, whether the statements of the witnesses of the Defendant, regarding those customs being according to the *Nuddea* law, might be understood also of the *Mythila* law.

The report of the law-officer, to the above inquiry, was as follows:—

"The marriage and funeral customs in the family of both parties, as stated, by the witnesses of the Plaintiffs, to be according to the *Mythila* law, cannot be understood as being of the *Nuddea* law, and those customs declared, by the witnesses of the Defendant, to be according to the *Nuddea* law, are, in many things, according to the *Mythila* law."

Mr. *C. Harding*, having departed to *Europe*, the cause was transferred to Mr. *N. J. Halhed*, another of the Judges of the *Sudder Dewanny Adawlut*, before

whom the further hearing of the appeal took place, on the 9th of *June* 1838, when, in consequence of the answer of the *Pundit*, who made the above report to the inquiries put to him, being considered as not sufficiently full, the following further questions were submitted to him.

"First. If the family priest of a person in whose family, for five generations, the rites of the *Mythila* law were performed, perform them according to the *Bengal* law, would those rites be good, or defective, to his follower, or disciple, who is ignorant of the law, and *Sanscrit*?"

"Second. If a family priest, from ignorance or fraud, perform the rites of his follower, ignorant of the law, and who is unable to correct the error of the family priest, according to other books and law, instead of the law established, are such rites prejudicial to the religion and rites of his follower?"

"Third. All the depositions of the witnesses, regarding the customs practised in the family of *Doolar Sing*, are sent for perusal and full consideration: state fully which of those depositions are according to the *Mythila* law, and which according to the *Bengal* law, and particularly whether the rites of the family of *Doolar Sing*, and himself, are according to the *Mythila* law, or the *Bengal* law."

"Fourth. Consider well the deposition of *Gora Jha*, who calls himself the family priest of *Doolar Sing*, and give an opinion, especially on his confession, that the rites were made according to the *Daya-bhaga*, which does not relate to rites, but only to division of shares, whether his deposition merits the attention of the Court."

"Fifth. Has a family priest the power of reading

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the *Bengal* or the *Mythila* law, at his pleasure, in performing the rites of his follower ? "

" Sixth. Read the legal opinions, filed by the Appellants, one in the case of *Bhyroo Sing*, No. 230; another in the case of *Dowlut Sing*, No. 231 ; a third in the case of *Mehrban Sing*, which was filed in Court, on the 29th of *May*, of this year, and state fully whether those opinions are according to the *Bengal* or *Mythila* law."

The Hindoo law-officer of the Court, returned his answers to the foregoing questions, as follows :—

" First. If the family priest of a person in whose family the rites of the *Mythila* law were performed, for five generations, perform them according to the *Bengal* law, those rites, with regard to his follower, who is ignorant of the law, and *Sanscrit*, are defective.

" Second. If the family priest, from ignorance or fraud, perform the rites of his follower, who is ignorant of the law, and cannot correct his error, perform rites by another law instead of the established law and books, those rites are prejudicial to the religion and right of his follower.

" Third. It appears, upon a full consideration of the depositions of the witnesses of both parties, that their customs are according to the *Mythila* law. By those of the Plaintiffs, some customs of marriage and some of funerals, and worship and offering funeral cakes on the thirty-second day after death, throwing of the bones, purification, and, in sudden death, the purification of the father and mother, three days after the death of their married daughter in the father's house, and after her delivery in his house, joint purifications, and purification after the death of a person on travel, are all according to the *Mythila* law. The witnesses

of the Defendant state the same customs, except the purification after sudden death ; but the marriage and funeral customs, worship, offering of cakes on the thirty-second day after death, throwing of the bones, purification of the father and mother, three days after the death of their married daughter in the father's house, and after her delivery in his house, joint purification, purification after the death of a person on travel, which they state are exactly according to the *Mythila* law. Although *Gora Jha*, the family priest, and some other witnesses of the Defendant, state the purification after sudden death to be on the third day, which is according to the *Bengal* law ; yet, by his answer to the fourth question in his deposition, it is unworthy of credit, and the depositions of other witnesses, of the Defendant, on this point, are contradicted by those of the Plaintiffs. The witnesses of the Defendant also state some customs of the *Mythila* law, as above stated ; it, therefore, appears that the customs and rites were practised according to the *Mythila* law ; a *Mythila Brahmin* being a family priest for five generations, is a strong proof of it. Although it appears by the nature of the questions of the Defendant to the witnesses, that she thinks the wearing of bracelets by the bridegroom on the wedding-day, is a custom of the *Mythila* law, and shouting at funerals is a custom of the *Bengal* law, yet these customs, as well as others, have nothing to do with the law. In the *Mythila* and neighbouring countries, especially in the family of *Soodras*, some wear and some do not wear *bangles* at their pleasure at marriages ; and at funerals, both in *Bengali* and *Mythila* families, shouting is made at pleasure ; such illegal customs, especially in low *Soodra* families, are no proof of the law. The strewing of rice

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by the bridegroom on the bride at a marriage was formerly practised in the *Mythila* and neighbouring countries, which is proved by the evidence of the witnesses of the Plaintiffs; the custom of singing, &c., of women, is current among those who wear the *Brahminical* string. The witnesses of both parties declare that there is no distinction of proper and improper times in their family, which is not according to the *Mythila* or *Bengal* law, for in both laws such a distinction is made; moreover, if a *Mythila Brahmin* be ignorant of the *Bengal* law, it cannot be inferred that he performed the rites according to the *Bengal* law; the law, therefore, of *Doolar Sing* and his family is the *Mythila* law.

"Fourth. *Gora Jha* alleges himself to be the family priest of *Doolar Sing*. In his deposition, he states some funeral and other rites, to be according to the book *Daya-bhaga*, which is not correct, for that book contains no funeral or other rites, and it does not deserve the attention of the Court; for *Gora Jha*, in answer to the fifth question, in his deposition, by the pleader of the Respondent, states that no one of the relatives or in the family of both parties died a sudden death, and that none died within fifteen days of each other; and in answer to the question of the pleader of the third parties, he states that fifteen days after the death of *Kunchun Sing's* mother, *Dhuroop Sing* died, and they are of the family of both parties; and as *Dhuroop Sing* died without a son, his funeral was made together with that of *Kunchun Sing's* mother: this is according to the *Mythila* law. *Gora Jha* again states that *Dhunoo Das*, the daughter's son of *Ghureeb Das*, and *Koonwur Sing*, the father-in-law of *Doolar Sing*, died suddenly; which shows his falsehood.

"Fifth. The family priest has not the power of performing the rites of his follower, at his pleasure, according to the *Mythila* or *Bengal* law.

"Sixth. The three opinions filed by the Appellants, sent me by the Judge, are according to the *Mythila* law."

Mr. *N. J. Halhed* recorded his opinion, on the 17th of *July* 1838, that it had been clearly proved, from the depositions of the witnesses, that the marriage and funeral customs in the family of both parties were according to the *Mythila* law, and that he had no doubt that by the Regulations and customs of the country, the *Mythila* law was followed in the family of both parties, and was, therefore, of opinion, that the decision of the District Judge of *Poornea* ought to be reversed, and the appeal and claim of the Appellants decreed in their favour. Accordingly it was ordered, "That the names of *Tilsa Sing* and others, the son's sons of *Ghureeb Das*, be written with those of the Appellants, and that the papers of the case be referred to another Judge, to pass a final order: that the appeal and claim of the Appellants, including *Tilsa Sing* and other third parties, under sec. xiii. Regulation III. of 1793, and by the opinion of the Hindoo law-officer of this Court, dated the 3rd of *April* 1833, and the precedent of the case of *Duttnaraen Sing* v. *Ajeet Sing*, [1 Ben. Sud. Dew. Rep. 20,] be decreed to all the Appellants, in equal shares, and *Pudmavati* have for life the expenses of her support, and of the necessary religious and other duties of a widow, according to the family usage of her husband."

In accordance with this order, the further proceedings in the appeal were transferred to, and the cause came on for hearing before, Mr. *W. Brandon*. After

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some further investigation, that Judge deemed it necessary, for the purpose of removing all further exceptions, to obtain the opinion from the Hindoo law-officer of the Civil Court of *Tirhoot*, upon the evidence deposed to by the witnesses in the Provincial Court, as to the customs observed by the family on the occasion of marriage and death, and accordingly submitted the following questions for his answer :—

"First. By the *Mythila* law and custom, on what day after death is the funeral offering generally made among *Soodra Sutgops* and other tribes, and what are the causes of hastening or delaying that ceremony?"

"Second. By the *Mythila* law and custom, by whom is that offering made; by the family priest, or any other; and the time of this offering; where is the *Soodra Sutgop* tribe; and is it necessary for the funeral priest to attend, or not; and if it be, what is the reason of it?"

"Third. By the *Mythila* law and custom, are joint funerals made; and if they are, how are they made for a person dying with or without a son?"

"Fourth. At the funeral of a *Soodra Sutgop*, when a bull is branded, can other *Brahmins* besides the funeral priest do it, by the *Mythila* law and custom?"

"Fifth. By the *Mythila* law and custom, are the branding of a bull at a funeral and the worship of a *Brahmin* and his wife made at the bank of a river, or not; and are the funeral priest and his wife entitled to this worship?"

"Sixth. By the *Mythila* law and custom, at the funeral ceremony, which is made on the thirty-first day, on the bank of a river, are all the gifts made by the person who has the funeral made, taken by the funeral priest, or not?"

"Seventh. If a bridegroom of the *Soodra Sutgop* tribe go two or three days' journey from his house, to be married, by the *Mythila* law and custom, will the offerings to deceased ancestors be made in his house before he goes, or after his arrival at the bride's house, on the wedding day?"

"Eighth. By the *Mythila* law and custom, is a re-marriage made, or not?"

"Ninth. If a married daughter bring forth, or die, in her parents' house, when are her parents purified?"

"Tenth. By the *Mythila* law and custom, are the marriages of the *Soodra Sutgops* made in all the twelve months, or what months are fixed; and is there an absolute rule for improper times; and if a low caste *Soodra* marry at an improper time, is the marriage good; and if it be wrong to marry at improper times, can the person who so marries, whether a *Brahmin* or *Soodra*, make expiation for it?"

"Eleventh. Are the rejoicings after a wedding, customs prescribed by law, or not; and are they made by *Sutgops* and *Soodras*, and are they general or partial?"

"Twelfth. Are the wearing of bracelets, the eighth rejoicing, strewing of rice, legal or local customs, and are they necessary to be observed at the marriages of *Soodras*, by the law and custom of *Mythila*, and is the rule regarding them general or partial?"

"Thirteenth. Is the custom to give the red powder again, four days after marriage, according to law and custom, or not; and is the observance of it imperative upon *Brahmins*, *Sutgops*, and other *Soodras* and tribes of *Mythila*?"

"Fourteenth. Is it imperative, by the law and cus-

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tom of *Mythila*, for the bride to wear *bangles* of *lac*, or shells, or shell rings?"

"Fifteenth. By the *Mythila* law and custom, on what day are the bones thrown at a funeral?"

"Sixteenth. What are the customs, by the *Mythila* law, of purification after a sudden death, and the term of it, and how many days after death is the funeral made?"

"Seventeenth. If within thirty days after the death of a person, any other of his family suddenly die, what is the rule, by the *Mythila* law, for his funeral?"

"Eighteenth. If a married maternal or paternal aunt, or cousin, die, is purification required, by the *Mythila* law and custom, or not? and if it is, how many days is it made?"

"Nineteenth. If the bridegroom take the bride by the hand at a wedding, and bring her from the house, and seat her under a shed, and then marry, is it according to the *Mythila* law, or not, and is the rule regarding it general or partial?"

"Twentieth. From the beginning of *Sawan*, in the *Bengal* year 1244, or *Fusly* year 1244, to the end of *Phagoon*, *Bengal* year 1245, or *Fusly* year 1246, making twenty months, what are the proper and improper months, passed by the *Mythila* almanac, for marriages? and in that time have any marriages been made, by *Brahmins*, *Cshatriyas*, *Vaisyas*, and *Soodras*, in the *Mythila* country?"

To these questions, the Hindoo law-officer of *Tirhoot* returned the following answers:—

"First. By the *Mythila* law and custom, the funeral offering among *Soodra Sutgops* is made on the thirty-second day from death, and there is no reason to hasten or delay it.

"Second. By the *Mythila* law and custom, the funeral offering is made by the family priest; and among *Soodras*, the funeral present is not necessary on that day. By the *Mythila* law and custom, joint funerals are made, whether of persons dying with or without a son; there is no difference.

"Fourth. A bull is branded at the funerals of *Soodra Sutgops*, by the funeral priests, instead of other *Brahmins*, by the *Mythila* law and custom.

"Fifth. By the *Mythila* law and custom, the branding of a bull and worship of the *Brahmin* and his wife are made at a river, and the funeral priest and his wife can have that worship.

"Sixth. By the *Mythila* law and custom, funeral rites are made on the thirty-first day, on the bank of a river, and the funeral priest takes the gifts that are made by the performer of the funeral.

"Seventh. If a *Soodra Sutgop* bridegroom go two or three stages from his house to marry, he will first make the offerings to the manes of his ancestors in his house, and go, and not in the house of the bride, by the *Mythila* law.

"Eighth. A re-marriage is not made by the *Mythila* custom.

"Ninth. By the *Mythila* law and custom, the parents of a married daughter dying or delivering in their house, are purified after three days.

"Tenth. By the *Mythila* law, no month is fixed for marriages. Formerly, they were made at proper times, and if they were made at improper times, there is no expiation required by law, and the marriages are good; this is the custom.

"Eleventh. The rejoicings at a wedding are legal customs, but made only by *Brahmins*.

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"Twelfth. Wearing *bangles*, the eighth rejoicing, and strewing rice, are not legal customs, but customs of the country, observed in some places, and not at others.

"Thirteenth. Giving red powder on the fourth day after marriage, is among *Brahmins*, and not imperative on other tribes.

"Fourteenth. By law, it is necessary for the bride to wear a shell ring, and *bangles* are worn by some, and not by others.

"Fifteenth. The bones are thrown on the fourth day.

"Sixteenth. The purification for a person dying in a foreign country, among *Soodras*, is thus: when his death is heard within the shaving time, that is, the thirtieth day, when a person is purified, and makes the funeral the next day; but if it be heard of after the funeral term, he will make the funeral three days after; and if a *Soodra* die a sudden death, his funeral rites will be made on the thirty-first day after death, by the *Mythila* law.

"Seventeenth. By the *Mythila* law and custom, if any one of the same family die a sudden death after the thirtieth day from the death of another, or die by illness, the funeral of both will be made thirteen days after the death of the last.

"Eighteenth. If married aunts and cousins die, purification is made three days after, by the *Mythila* law.

"Nineteenth. It is a general rule, by the *Mythila* law, for the bridegroom to take the bride by the hand, and seat her under a shed at the wedding, which then takes place.

"Twentieth. From the beginning of *Sawan* 1244 *Fusly*, to the end of *Phagoon* 1246, the 7th of the moon

was a proper time when many marriages might have been made; and if they are made at improper times, they are good, as in the tenth answer."

The above answers being transmitted to the *Sudder* Court, and the whole proceedings reviewed, Mr. *Brandon* pronounced the final decree in the cause, on the 3rd of *December* 1839, as follows :—

"As it does not at all appear by the papers, reports and answers of the Hindoo law-officer of this Court, the evidence of the witnesses, and answers of the law-officer of the Civil Court of *Tirhoot*, that the *Bengal* customs were followed in the family of both parties, and it is clearly proved that the *Mythila* customs are followed by them, therefore, and upon the opinion and answers of the Hindoo law-officer of this Court, and of the *Tirhoot* Court, which are decisive of the observance of the *Mythila* customs in the family of both parties, and upon the decisions in the cases of *Dhun Sing* and others, stated in the opinion of that Judge, and for the reasons given in it, which are correct and proper, I concur exactly in opinion with that Judge, and finally order that the appeal of the Appellants be decreed; the decision of the Judge of *Poornea*, dated the 7th of *February* 1835, be reversed, and the Appellants, the sons' sons of *Ghureeb Das*, deceased, agreeably to the opinion of Mr. *N. J. Halhed*, a former Judge, recorded in his proceeding of the 17th of *July* last year, be put in possession of the *pergunna* of *Powa Khalee*, and other property in dispute, the estate of *Run Lal Sing*; that *Pudmavati*, Respondent, have for life the expenses of her support and necessary rights and ceremonies of a widow, according to the family usage of her husband."

On the 24th of *February* 1840, a petition was pre-

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sented to the *Sudder* Court, by *Tilso Sing* and four others of the Respondents, praying that the decree, so far as it related to the direction, "that the Appellants, the sons' sons of *Ghureeb Das*, deceased, agreeably to the opinion recorded in Mr. *Halhed's* proceeding, be put in possession of *pergunna Powa Khalee*, and other property in dispute," might be amended, and an order passed, directing the petitioners to be put jointly in possession with the other present Respondents, that there might be no dispute hereafter in the execution of the decree of the *Sudder* Court about shares and partition. By an order of the *Sudder* Court, bearing date the 5th of *March* 1840, it was ordered, "that the decree of this case be made joint without prescribing shares."

The Appellant, after praying for a review of judgment, which was refused, brought the present appeal, which now came on for hearing.

Mr. *Buller*, Q.C., Mr. *Jackson*, and Mr. *Forsyth*, for the Appellant.

The claim of the Appellant is founded, as to one moiety of the estate, upon her right to succeed as the widow of *Pohput Sing*, who died without issue, and as to the other moiety, as devisee under the Will of *Rung Lal Sing*. The law of *Nuddea* must be applied to this case. The customs and usages upon which the Court below determined the question, are the same in *Nuddea* as in *Mythila*. According to the *Bengal* law, a childless widow is entitled to succeed to her husband's share of the estate. *Keerut Sing* v. *Koolahul Sing* (*a*). 1 *Strange's* Hindoo Law, 121. (2nd Edit.) The testa-

(*a*) 2 Moore's Ind. App. Cases, 331.

mentary disposition by *Rung Lal Sing* is valid and effectual in law. *Mulraz Lachmia* v. *Chalekany Vencata Rama Jagganadha Row* (*a*). *Baboo Janokey Doss* v. *Bindabun Doss* (*b*). *Bengal* Regulations, XXXVI. of 1793, and V. of 1799. But there is a fatal objection to the claim of the Respondents, which is barred by the provisions of Regulations III. of 1793, and II. of 1805. The Respondents claim upon the general principle, that all the members of an undivided Hindoo family are equally entitled to the property acquired by their ancestor, or by any of his descendants, by means of the funds which they acquired from such ancestor. They do not claim as heirs of *Rung Lal Sing*, the person last seised, who died in 1825, but as having been co-heirs with him, of *Ghureeb Das*. The title of the Respondents, as members of an undivided Hindoo family, first accrued on the death of *Ghureeb Das*, their ancestor. They have failed to prove that they, or those through whom they claimed, had ever any joint interest in the property in dispute: on the contrary, the finding of the Provincial Court established the fact that the estate was held as the property of *Huree Sing* and his descendants, without any participation therein by the Respondents, or those through whom they claim There has been an adverse possession since *Huree Sing*, and the Respondents are, therefore, barred by the Regulations of Limitation; for there is nothing in the case of co-sharers, to prevent the Regulations being pleaded in bar. *Radachurn Mohapatur* v. *Gunganaraen Mohapatur* (*c*). *Ramdhun Sein* v. *Kishen Kanth Sein* (*d*).

(*a*) 2 Moore's Ind. App. Cases, 54.
(*b*) 3 Moore's Ind. App. Cases, 175.
(*c*) 1 Ben. Sud Dew. Reps., 297.
(*d*) 3 Ben. Sud. Dew. Reps, 100.

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Nundram Dyaram v. *Dula Bhaee Kurparam* (*a*). *Sheikh Imdad Ali* v. *Mussumat Koothy Begum* (*b*). Assuming the property to be thus separately acquired by either *Huree Sing*, or *Sobhe Kurun Sing*, the Respondents can have no claim so long as any heir, male or female, of *Huree Sing*, or *Sobhe Kurun Sing*, or any legatees or donors from such heirs, exist.

Mr. *Wigram*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondents.

The right of succession to this property is governed by the law of *Mythila*, and according to that law the Respondents, the sons' sons of *Ghureeb Das*, are entitled to succeed to the estate vacated by *Huree Sing's* decease. *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (*c*). It was a question of fact for the Court below, whether the *Bengal* or the *Mythila* law was to be applied, to determine the right to succeed; and it was satisfactorily established, that the family observed the religious customs and ceremonies of *Mythila*, and, therefore, the *Sastras* of *Mythila* must regulate the rights of the parties. *Rajchunder Narain Chowdry* v. *Goculchund Goh* (*d*). *Rutchmeputty Dutt Jha* v. *Rajunder Narain Rae*. If it were a question of *lex loci*, the *Mythila* law would govern, as the property is situate in *Mythila*. No evidence was given, to prove the alleged Will of *Rung Lal Sing*. The depositions filed by the Appellant were those taken *ex parte*, before the Collector, in a preliminary proceeding for the purpose of registration: such depositions are not evidence to bind the Respon-

(*a*) 1 Moore's Ind. App. Cases, 414.
(*b*) 3 Moore's Ind. App. Cases, 1.
(*c*) 2 Moore's Ind. App. Cases, 132.
(*d*) 1 Ben. Sud. Dew. Reps., 43.

dents in this suit; but assuming that the Will was a well-executed instrument, it is not valid and operative, by the *Mythila* law. *Sham Singh* v. *Mussummaut Umraotee* (*a*). 1 *F. Macnaghten's* Cons. on the Hindoo Law, 274. 1 *Strange's* Hindoo Law, 259, 267. (2nd Edit.) A Will, according to the Hindoo law in force in *Mythila*, must be considered as a deed of gift, and is invalid unless accompanied by possession. 1 *F. Macnaghten's* Cons. on the Hindoo Law, 274. 1 *Strange's* Hindoo Law, 254. (2nd Edit.) The same result would also apply if the *Bengal* law prevailed. *Rung Lal Sing* could not by that law make a Will, disposing of the ancestral immovable property to the prejudice of his heirs. *Bhowannychurn Bunhoojea* v. *The Heirs of Ramkaunt Bunhoojea* (*b*). No question relating to the Will, in strictness, can now be raised, for the order of the *Sudder* Court, of the 9th of *May* 1833, setting it aside, was never appealed from. The only other point raised by the Appellant is, that we are barred by the *Bengal* Regulations of Limitation, III. of 1793, and II. of 1805: neither of these Regulations, or any of the authorities cited upon this question, by the Appellant, apply: we claim as the heirs of *Rung Lal Sing*, the *Zemindar* last seised.

The Right Hon. T. PEMBERTON LEIGH:

It appears to their Lordships, in this case, that the mode in which the Respondents have stated their case at the bar, makes it quite unnecessary to enter into any consideration of the several questions, which were opened to the Court, on the part of the Appellant. The Respondents now rest their claim to this estate,

(*a*) 2 Ben. Sud. Dew. Reps., 74.
(*b*) 2 Ben. Sud. Dew. Reps., 202.

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entirely as the heirs of *Rung Lal Sing*. They say, that *Rung Lal Sing* died intestate; and that they, the Respondents, are his heirs. They claimed the property immediately upon the death of *Rung Lal Sing*, and all question, therefore, upon the Regulations of Limitation, appears to us to be out of the case, so far as applies to the title they set up, as heirs of *Rung Lal Sing*.

So again, all question as to the property being ancestral, or not ancestral, and as to the family being divided or undivided, must be put out of consideration. The only two questions appear to us, to be, first, did *Rung Lal Sing* die intestate? and secondly, if he did die intestate, are the Respondents his heirs?

With respect to the first question, when the case was originally opened to us, the *factum* of the Will appeared to have been proved in the cause, and not to have been disputed by any cross examination of those witnesses, who appeared on the part of the Appellant, or otherwise. Under those circumstances, it did appear to us to be somewhat singular that merely upon a general presumption of fraud, the question, as to the validity of the Will, should have been decided against them; but it turns out now, that improper evidence was given in the suit, upon the fact of that Will being, or not being, genuine. On the death of *Rung Lal Sing*, certain depositions were taken, not however in this suit, but long before the institution of this suit; and it appears that they were taken for an entirely distinct purpose, namely, in one case for the purpose of the proceedings in the Civil Court, and in the other case for the purpose of proceeding before the Collector. The object of the proceedings in the Civil Court, was to substitute the name of the Appellant for the name of *Rung Lal Sing*, in all pro-

ceedings with respect to the *Zemindary*. The object of the proceedings before the Collector was to have the name of the Appellant registered, instead of the name of *Rung Lal Sing*, as proprietor of the *Zemindary*. Now it seems that the Collector acted upon the Will, and that the Civil Court acted upon the decision of the Collector. The decision of the Collector, of course, was not a proceeding in any Court of justice at all. It was not a judicial proceeding; and by Regulation VIII. of 1800, section xxi., it is expressly provided, that the entry of the Collector shall not in any degree "affect the rights of any party whose name may be registered therein, as the ostensible proprietor of the land, or whose name may not have been registered as the proprietor, but who may establish a right of property in the *Adawlut*, or otherwise." It does not very distinctly appear whether the Respondents had, or had not, an opportunity of cross-examining the witnesses. It does not appear that they had, for they presented a petition, alleging that this Will was a fabrication, and praying that certain witnesses, whose names they mentioned, might be examined to prove the fact of that fabrication. What was done upon this, does not distinctly appear; but at all events, it was a distinct notice to the Appellant, that the Respondents alleged the Will to be a forgery.

When the suit was brought, the intestacy was alleged; and in this state of things, certainly it was incumbent upon the Appellant, if she relied upon that, which was thus disputed, to produce clear and conclusive evidence in favour of that instrument. But in fact, she produced no evidence whatever; that is, no evidence which could have much weight, we think, in any Court of justice. It was, however, received below,

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and, therefore, we do not apprehend that we can treat it, as not being evidence in the cause. But still it is evidence of such a character, that it appears to us impossible for any Court to rely upon it.

Now the *Sudder* Court were of opinion, that the Will must be disregarded; and on the 9th of *May* 1833, they pronounced an order, which, after stating that the Will produced by the Appellant was not correct or credible, and that, by the legal opinion of the Hindoo law-officer of this Court, it appeared that the estate of *Rung Lal Sing* descended to the Plaintiffs by the Hindoo law, current in the country of *Mythila*, and that *Rany Pudmavati* was entitled to the expenses of her support and religious ceremonies, according to the usage of the family; the Court then decided certain inquiries with respect to that law.

It is said that that order, which was made on the 9th of *May* 1833, was founded upon the assumption of the invalidity of that Will, and that, not having been appealed from, the question of the validity of the Will is not now open. Now it does not appear to us to be necessary to decide that point, because we are clearly of opinion, that there was no evidence before the Court, upon which they could properly have acted to affirm the validity of that Will.

Then the fact of the Will being out of the case, of course it becomes unnecessary to consider whether, by the *Mythila* law, there was a power of demising, or not, and, therefore, the very able argument addressed to the Court, on behalf of the Appellant, it is not necessary for us to deal with.

The whole question, therefore, is, does the *Mythila* law prevail in this family, to govern the descent of its property? and, if it does, are the Respondents, by law,

the heirs? Now, the pedigree is not disputed, and we have the opinion of all the law-officers, that, according to that pedigree, the Respondents are, by the *Mythila* law, the heirs, and there is nothing appearing in the cause against that.

Now, how does the *Mythila* law govern this case? Upon this point there appears to have been a most careful inquiry, in the Court below. The decree of the *Moorshedabad* Court assumed that the *Bengal* law prevailed, and upon this the Respondents appealed to the *Sudder* Court, which, upon hearing the cause, decided that the *Mythila* law prevailed. Now, this fact, that the *Mythila* law was to prevail, does not, at that time, appear to have been disputed, for we find the matter thus stated by the Judge, Mr. *Walpole*: "It appears, by the papers, that the real claim of the Plaintiffs is for the estate of *Rung Lal Sing*, and that the estate of *Ghureeb Das*, and others, is stated only to trace the connection of the ancestors. The allegation of the Appellants, that the *Mythila* law is followed in their family, appears to be correct, and is not denied by the Respondents. It is, therefore, necessary, in this case, to ascertain which of the two, and the third, parties is entitled to the estate of *Rung Lal Sing*, who died unmarried, and without issue, by the *Mythila* law." On the 20th of *February* 1833, that decree was made, directing the inquiry as to who, according to the *Mythila* law, was entitled to succeed, which law was to prevail, and on the 3rd of *April* 1833 an opinion was given in favour of the Respondents.

Upon this, the Appellant presented a petition, alleging that the *Mythila* law did not prevail in her family, and that was the first occasion on which that representation was made. Thereupon, on the 9th of

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May 1833, the *Sudder* Court remitted the cause to the Provincial Court, treating the Will as invalid, and directing an inquiry into the fact, of which law prevailed in this family. A vast deal of evidence was gone into, when the case came before the *Poornea* Court, which had succeeded the *Moorshedabad* Court, and they decided that the *Bengal* law governed the succession.

Against this decree there was an appeal to the *Sudder* Court, and, on the 15th of *January* 1838, the cause came before Mr. *Harding*, one of the Judges of that Court. The judgment sets forth, that in consideration of the dispute and statements of both parties, and the nature of the case, it is necessary to ascertain, before the decision, what were the customs and rights of marriages and funerals, deposed to by the witnesses of both parties, whether they were, according to law, or not; the pleaders of both parties were, therefore, questioned, and they consented to refer the matter to the Hindoo law-officer of this Court. Ordered, therefore, that a copy of the proceedings be sent with the depositions of witnesses, of both parties, to him, with an order to make a full report, in two weeks from the date of receiving it, after giving full consideration to the depositions, whether the marriage and funeral customs, and rites of the *Mythila* law, stated by the witnesses of the Plaintiffs to be observed in the family of both parties, can be understood, also, of the *Nuddea* law, and whether, similarly, the customs and rights stated by the witnesses of the Defendant, to be according to the *Nuddea* law, can be understood, also, of the *Mythila* law.

On the 17th of *May* 1838, the officer made his report in favour of the Respondents. The Appellant was dissatisfied with the report, which was merely

a short statement of the officer's opinion, being in favour of the Respondents, without going into particulars. And on the 26th of *June* 1838, the case came before Mr. *Halhed*, another Judge, and he directed further questions to be prepared, in order further to elucidate this matter.

A further opinion was then given by the Hindoo law-officers, and that opinion was also in favour of the Respondents.

Upon this, the Judge of the *Sudder* Court, before whom the case originally came, was of opinion against the decree of the Court below, and it became necessary, as we understand the practice is, to go to a second Judge of the *Sudder* Court; and, accordingly, it did go to a second Judge. And then, it appears, that he made a still further inquiry upon this subject, after having called the pleaders of both parties; and he settled the questions, it appears, in their presence: and they must, therefore, be taken to have both agreed upon those questions. The questions, in this case, were originally prepared for the opinions of the Hindoo law-officers, and it seems to have been considered, justly perhaps, that after all that had passed, the Hindoo law-officers having given their opinion several times, it would be better to take the opinion of the officer of the *Tirhoot* Court, where the law prevailed. Those questions were prepared, and the officer of the Court of *Tirhoot* gave his answers upon all those questions.

Now, these questions were framed with a view of enabling the Court to judge, by the answers to the particular questions put by him, whether, according to the evidence which was before him, of what appeared to have been the ceremonies used in this family, the *Mythila* law, or the *Bengal* law, prevailed; and he was

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clearly of opinion, that the *Mythila* law prevailed, and confirmed the opinion of the first Judge, and the decision was finally pronounced.

Now, it is admitted, that it is utterly impossible for any European Court to weigh, very nicely, the effect of evidence of this kind, as to particular ceremonies, and the weight which is to be due to those particular ceremonies, as establishing the fact of one law prevailing, or the other, and, therefore, the learned Counsel at the bar have, very naturally and very properly, abstained from going into any minute examination of the evidence, upon this point. The question, therefore, for us, is, is there evidence before us, which shows that the opinion which was come to, after repeated investigation, and after taking the opinions of the various law-officers of the Courts, all of them concurring in the same conclusion, is an opinion by which we should be guided?

Now, certainly, so far from there being anything in the facts, now before us, which is inconsistent with this, the most important fact appears to us to be consistent with it. On the death of *Sobhe Sing*, *Pohput Sing*, and *Rung Lal Sing*, being his sons, became joint proprietors, and entered into possession of this estate. *Pohput Sing* died, leaving a widow, and, according to the *Bengal* law, the widow of *Pohput Sing* would have been entitled, under these circumstances, to succeed to the share of *Pohput Sing*, her deceased husband, for her life. And, certainly it was understood, from the original statement of the case, that, upon the death of *Pohput Sing*, she did so succeed to her husband's share, and that she came into possession of the other half of the estate, upon the death of *Rung Lal Sing*. But the evidence, upon examination, turns out to be quite the reverse;

for it is clear that *Rung Lal Sing*, upon the death of *Pohput Sing*, presented a petition, stating his title, as a title to the whole estate, and that he was let into possession of it, and that she was entitled to maintenance out of it, according to the *Mythila* law, and that that maintenance was preserved to her.

Again, upon the death of *Rung Lal Sing*, the Appellant herself presented a petition, and she claimed, as successor under the Will, the whole of the property of *Rung Lal Sing*. It seems, therefore, clear, that upon the death of *Pohput Sing*, and upon the death of *Rung Lal Sing*, the succession was regulated by the *Mythila* law, and not by the *Bengal* law. That was entirely in accordance with the result to which, after an examination of the whole of the evidence, the Court below has come, and we are of opinion that that decree is perfectly right, and, therefore, that it must be affirmed, and with costs.

Lord BROUGHAM:

It is impossible to praise too highly the great care which the Court below appears to have taken, in obtaining the best possible information upon the subject, a somewhat nice and intricate subject, of the customs and ceremonies governing this case. There were three or four separate inquiries, giving the parties the fullest opportunity of suggesting questions, and directing further inquiry, when the reports were not sufficiently decisive; and it was found that the parties were quite satisfied with the nature of the questions that were laid before the *Pundits*. I never saw a case better sifted than the present, and it certainly affords this Court great confidence in coming to the decision which it has now pronounced.

RANY SRIMUTY DIBEAH - - *Appellant,*

AND

RANY KOOND LUTA, and RANY RUNG LUTA, and Others - - - *Respondents.**

On Appeal from the Sudder Dewanny Adawlut at Bengal.

2nd & 3rd Dec. 1847.

Upon a claim to the inheritance of a *Zemindary*, situate in *Midnapore*, which had been in possession, for a long period anterior to the institution of the suit, by a family of *Sutgop Brahmins*, who had migrated from *Bengal* to *Midnapore*, but had retained their laws and performed their religious ceremonies, according to the *Daya-bhaga* and other authorities in force in *Bengal*. It was held, by the Judicial Committee, affirming the judgment of the *Sudder* Court, that the *Daya-bhaga Sastras* must govern the descent, and not the *Mitacshara*, which prevailed in *Midnapore*.

A deed of gift of the *Zemindary*, to a stranger, by the widow of the *Zemindar*, last seised, who died without issue, which gift was made with the confirmation of the *Bandhus*, the mother's brother's sons, the heirs: Held to be valid by the *Daya-bhaga Sastras*, as against a party claiming the succession, according to the *Mitacshara*, as being descended, in the seventh remove, in the male line, from the common ancestor.

THE Appellant in this appeal was the widow and representative of *Kundurp Sing*, the original Plaintiff, who died pending a suit instituted by him, to establish the right to four *pergunnas*, named *Midnapore*, *Dhakea-Bazar Monohur*, *Gurh*, and *Tuppa Bahadurpore*, constituting a *Zemindary*, situate in *Zillah Midnapore*, in the Presidency of *Bengal*. The Respondents, *Rany Koond Luta* and *Rany Rung Luta*, were the surviving widows and representatives of *Raja Mohun Lal Khan*, one of the original Defendants, who also died pending the suit. *Kundurp Sing*, the original Plaintiff, claimed

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillor,—*Assessor*,—Sir E. Ryan, Knt.

the *Zemindary* under an *ikrar-potta*, or declaratory instrument, alleged to have been executed by *Rany Seeromany*, the widow of *Raja Ajeet Sing*, the *Zemindar* last seised, by which she constituted *Kundurp Sing* the proprietor of the *Zemindary*. He also claimed, by hereditary right, the *Zemindary*, as the lineal heir male, in the seventh remove, of *Raja Ajeet Sing*, according to the *Mitacshara* and other authorities current in *Orissa*, which law, he contended, governed the right of succession to the deceased *Raja's* estate.

Raja Ajeet Sing died, in 1755, without issue, leaving *Rany Bhowany*, and *Rany Seeromany*, his widows, surviving, who succeeded to the *Zemindary*, and held joint possession thereof till *Rany Bhowany's* death, in the year 1757: from that period *Rany Seeromany* continued in sole possession of the *Zemindary*.

On the 1st of *July* 1800, *Rany Seeromany* executed a deed of gift of the *Zemindary* in favour of *Anund Lal Khan*, the brother of *Mohun Lal Khan*, who, by virtue thereof, entered into possession of the *Zemindary* and the other property of the *Rany*.

In the year 1802, *Roop Churn Mahapatur* and *Mussumat Kownla*, alleging themselves to be heirs of the deceased, *Raja Ajeet Sing*, instituted a suit in the *Zillah* Court of *Midnapore*, against *Anund Lal Khan* and *Rany Seeromany*, to annul the gift of the *Zemindary*. In this suit the *Rany* and *Anund Lal Khan* put in a joint answer to the plaint, in which the *Rany* admitted and maintained the donation to *Anund Lal Khan*. This suit was dismissed.

On the 24th of *September* 1806, *Rany Seeromany* brought a suit, *in formâ pauperis*, in the *Zillah* Court of *Midnapore*, against *Anund Lal Khan* and others, to

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set aside the deed of gift executed by her, and to recover possession of the *Zemindary*. The Plaintiff was nonsuited, on the ground of misjoinder, leave being reserved to her to bring a suit against *Anund Lal Khan* alone, for recovery of the *Zemindary*.

In pursuance of the leave thus given, the *Rany* instituted a second suit, in the *Zillah* Court, against *Anund Lal Khan* alone, and *Anund Lal Khan* put in his answer; but before the cause came on for hearing, the proceedings were transferred, agreeably to Reg. XIII. of 1808, to the Provincial Court of *Calcutta*.

Pending this suit, *Anund Lal Khan* died, having, previously to his decease, conveyed the *Zemindary*, in dispute, to his brother, *Mohun Lal Khan*, who was admitted to defend the suit.

On the 30th of *March* 1811, the Provincial Court, after having taken the opinion of the *Pundit* of the Court as to the validity of the deed of gift by the *Rany*, held it to be invalid, upon the ground that such a deed could not be effectually made without the concurrence of all the expectant heirs of *Raja Ajeet Sing*, who were his mother's brother's sons; the Provincial Court, therefore, decided the case in favour of the *Rany*.

Mohun Lal Khan appealed from this decision to the *Sudder* Court, but that Court affirmed the decision of the Provincial Court (*a*). *Mohun Lal Khan* appealed from this decree to *England*. Pending the appeal, *Rany Seeromany* died; and, on her death, the property came into the custody of the Court of Wards.

Upon the *Rany's* death, *Kundurp Sing* claimed the *Zemindary*, and, as it was also claimed by *Mohun Lal Khan*, the Judge of the *Zillah* Court of *Midnapore*, on

(*a*) See case reported, 2 Ben. Sud. Dew. Reps., 32.

the 24th of *December* 1813, ordered that *Mohun Lal Khan*, and *Kundurp Sing*, and any other persons who might have claims to the possession of the *Zemindary*, either by inheritance or by any other right, might present petitions on the subject to the Judge of the *Zillah*, agreeably to Section iv. of Reg. V. of 1799.

Mohun Lal Khan and *Kundurp Sing* accordingly filed petitions in support of their several claims, and the Judge of that Court proceeded to a summary trial thereof.

Kundurp Sing rested his claim upon an *ikrar-potta*, or deed of gift, alleged to have been executed in his favour, by the *Rany*, shortly before her death. *Mohun Lal Khan* rested his claim, not only on the ground of the gift in favour of *Anund Lal Khan*, and his appeal to *England*, but also on the ground that the right of possession was accorded to him by the heirs of *Raja Ajeet Sing*, viz., the mother's brother's sons of *Raja Ajeet Sing*.

The Judge, on the 24th of *December* 1813, recorded his opinion, on the several claims, in substance, as follows:—"The *ikrar-potta*, or agreement, dated the 3rd of *Assin*, being the end of 1219, *Amli*, one day before the death of *Rany Seeromany*, which *Kundurp Sing* has presented to the *Zillah* Court in support of his claim to the *abhishek* of the *Zemindary*, &c., as his right and possession, as having been executed by *Rany Seeromany*, was fabricated after the demise of the said *Rany*, and is not genuine nor worthy of confidence, and the right of *Kundurp Sing* to the property left by the *Rany* has not been proved or established, either by the document, or by hereditary right according to the *Sastras*." The Court then proceeded:—"According to the

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bewusta of the *Pundit* of this Court, which was filed in the suit, *Mohun Lal Khan* v. *Rany Seeromany*, and the contents of which were entered in the decree of this Court, dated the 31st of *August* 1812, *Koochil Bhoonya*, and *Bulbhudder Bhoonya*, and *Radha Govind Bhoonya*, the sons of *Sagrissa Bhoonya*, and *Ram Kishen Bhoonya*, the brothers of the mother of *Raja Ajeet Sing*, are the heirs of *Raja Ajeet Sing*, the husband of the *Rany Seeromany*, and, after the demise of the *Rany*, will be entitled to the *Zemindary*, &c., the property left by *Raja Ajeet Sing* and the *Rany*. Three of the heirs above-named have, of their own accord and will, presented *la-davis* (or renunciations) to the *Zillah* Court, under their own signatures, setting forth that they have received a consideration, in lieu of their rights, from *Mohun Lal Khan*, and transferring their hereditary rights in the property left by *Raja Ajeet Sing* and *Rany Seeromany*, to *Mohun Lal Khan*; and *Koochil Bhoonya*, who, after presenting the first petition, in conjunction with *Radha Govind Bhoonya* and *Bulbhudder Bhoonya*, to the effect above stated, presented a second petition to the *Zillah* Court, stating his opposition to the conveyance of his own rights, subsequently presented a third petition, alleging the transfer of his own rights to *Mohun Lal Khan*, to the *Zillah* Court, and personally attended and acknowledged that he was aware of the contents of the petition, and twice signed the same with his own hand. Notwithstanding the circumstances above detailed, in consequence of *Mohun Lal Khan* having appealed to *England* on account of the suit decided by this Court, and that the appeal in this suit is pending, it is, in the opinion of the Judge, proper that the *Zemindary* in dispute

remain in the custody of the Court of Wards until the appeal to *England* be decided."

The last proceeding came before the *Sudder Dewanny Adawlut*, and that Court being of opinion that no sufficient reason appeared for continuing the *Zemindary* in the custody of the Court of Wards, by an interlocutory order, bearing date the 14th of *February* 1814, directed the Judge of the *Zillah* Court to give effect to his summary decision, by placing *Mohun Lal Khan* in possession, if he thought him the person entitled, on his giving security. Accordingly, by an order of the *Zillah* Court, dated the 4th of *March* 1814, *Mohun Lal Khan* was directed to be put in possession of the *Zemindary*.

The correctness of the conclusion arrived at in this summary proceeding was afterwards brought by *Kundurp Sing*, in the way of appeal, before the *Sudder* Court, and Mr. *Harington*, the Chief Judge, after recording his opinion, that there was strong presumption that the deed of gift adduced by *Kundurp Sing* was fabricated, submitted the following questions to the *Pundits*:—

First Question.—" Supposing the genuineness of the document in question to be established, and that *Rany Seeromany* put her signature to it while in the possession of her reason, one day before her dissolution, what part of the property in the *Zemindary* left by *Raja Ajeet Sing*, and in its produce, and in the other effects left by *Raja Ajeet Sing*, which were in the possession of *Rany Seeromany*, also of the property acquired by *Rany Seeromany* herself, goes to the Appellant by virtue of the gift and the *wusseeyut* of the *Rany*?"

Second Question.—" Supposing the genuineness and credibility of the document be not established, and

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that some of the descendants in the line of the deceased *Rany's* father and grandfather are living, is the *stridhana* (personal property) left by the said *Rany* to go to the descendants of the *Rany's* father and grandfather, or to her late husband, *Raja Ajeet Sing's* mother's brother's sons, or others of his heirs, as their right of inheritance?"

To these questions the law-officers of the Court delivered their opinion in the following terms:—

"Supposing the genuineness of the aforesaid document be established, and that *Rany Seeromany* put her signature to it while in the possession of her reason, one day before her demise, yet, as *Rany Seeromany* has, without the permission of the heirs, also as she has not separated the conditional gift, which goes to state that the donee shall have possession after the death of the said *Rany*, and as she has made a *wusseeyut* of the *Zemindary*, left by *Raja Ajeet Sing*, and of its produce, and of other effects left by *Raja Ajeet Sing*, which were in her possession, and the property she (the said *Rany*) acquired by means of the *Zemindary*, and the aforesaid produce which appertains to the *Zemindary*, and the produce above adverted to; and as the gift and the *wusseeyut* made by *Rany Seeromany* of three denominations of property, as aforesaid, are invalid under the *Sastras*, therefore, the said three descriptions of property cannot go to the Appellant by virtue of the gift and the *wusseeyut* made by the *Rany* aforesaid. However, such property as *Rany Seeromany* acquired, independent of the means of the *Zemindary*, and the produce above adverted to, is her *stridhana*. As the *Rany* can exercise her separate right in making a gift and a *wusseeyut* of her *stridhana*, with the exception of immoveable property given to her by her

husband, therefore the *stridhana* of the *Rany* in question (with the exception of the immoveable property given to her by her husband) can go to the Appellant by means of gift and a *wusseeyut* of the same. This *bewusta* has been delivered according to the *Dayabhaga.*" The *Pundit* annexed to this opinion, extracts from the authorities.

The second question put by the Court havingreference only to the *stridhana*, or personal property of the *Rany*, it is not necessary to set forth the answer given by the *Pundits* to that question.

On the 2nd of *August* 1815, the *Sudder* Court ordered that the summary decree and order of the *Zillah* Court should be affirmed and maintained, and the appeal dismissed.

On the 6th of *November* 1815, *Kundurp Sing* instituted a suit, *in formâ pauperis*, in the Provincial Court of *Calcutta*, against *Mohun Lal Khan*, the then *Zemindar* in possession, and also against *Radha Govind Bhoonya*, *Koochil Bhoonya*, and *Bulbhudder Bhoonya*, his mother's brother's sons of *Raja Ajeet Sing*; and in the plaint he set forth his title as descended, in the seventh remove, from the common ancestor, *Lukhun Sing*, and after admitting that his uncles *Gujraj* and others were more nearly related to the common ancestor than himself, said that they had relinquished their rights in his favour, and he claimed the *Zemindary* as the nearest male heir, according to the usage of the family, and the *Sastras* extant in *Orissa*, and he also alleged that the late *Rany Seeromany* had, on the day previous to her decease, executed the *ikrar-potta* in his favour, whereby she made over to him the entire *Zemindary* and other property and effects which she had in her possession, and constituted him *Malik* and

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Mokhtar of them, and her heir apparent, and he thereby claimed the *Zemindary*.

The Defendant, *Mohun Lal Khan*, filed his answer, on the 23rd of *January* 1816, wherein he denied that the Plaintiff was related to *Raja Ajeet Sing*, or had any claim to the *Zemindary*; he moreover denied the validity of the alleged deed of gift of *Rany Seeromany*, and, after referring and relying upon the proceedings already taken, and the judgment and decision of the *Sudder* Court, in the summary proceedings, he took issue upon the allegations of the Plaintiff relative to the usages of the family of the deceased *Raja*, and the *Sastras* followed by them, insisting that they were the *Sastras* followed in *Bengal*.

The other Defendants put in their answers.

On the 23rd of *May* 1818, *Kundurp Sing* filed a supplemental plaint, *in formâ pauperis*, denying that the usages of *Bengal* were current or received in the family of *Raja Ajeet Sing*.

Radha Govind Bhoonya and *Bulbhudder Bhoonya*, two of the Defendants, died, and the Provincial Court admitted other parties to represent the respective interests of those deceased Defendants.

The cause being at issue, evidence, both oral and documentary, was produced on both sides. The Plaintiff filed, among other documents, the alleged deed of gift, and examined witnesses to prove its execution by the *Rany*. These witnesses spoke to acts done in their presence by the *Rany*. The Plaintiff failed in proving that the alleged deed was executed with the concurrence of the expectant heirs, whose consent would be necessary to give validity to the deed, if genuine. The claim, therefore, by virtue of the deed, failed. And with reference to the Plaintiff's claim as heir of

Raja Ajeet Sing, the Plaintiff failed in proving his descent in point of fact; and, according to the pedigree on which he relied, it appeared that even according to the rules of descent by which he claimed, there were nearer heirs of *Raja Ajeet Sing* still living; and although he called witnesses on the subject, he failed in giving any satisfactory evidence to show that the rules of the *Mitacshara* were followed in the family of *Raja Ajeet Sing*.

The Defendant, *Mohun Lal Khan*, produced numerous witnesses, to prove that the alleged *ikrar-potta* was a fabricated instrument, and also that the religious ceremonies in *Ajeet Sing's* family were performed according to the *Daya-bhaga* and other *Sastras* of *Bengal*.

After the evidence had been taken, Mr. *Gilbert Coventry Master*, the First Judge, before whom the cause was pending, submitted the following questions for the consideration and *bewustas* of the *Pundits* of the Courts :—

First Question.—" In the event of the *Raja* of the *Sutgop* caste, who has been the holder and possessor of his hereditary *Zemindary*, dying without issue, and of his wife, who has been the holder and possessor of the *Zemindary* left by her husband, dying, supposing there to be in existence *sagotras* of her husband, of the seventh remove, and *bandhus*, viz., mother's brother's sons of her husband, which of those persons, according to the *Mitacshara Sastras*, and which persons according to the *Daya-bhaga Sastras*, will become the heirs and owners to the *Zemindary* referred to? Write out a *bewusta* on this point agreeably to both *Sastras* under these questions, and file it."

Second question.—" In what particular countries,

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appendant to what particular *soobas*, are the *bewustas* of particular *Sastras* current and in use?"

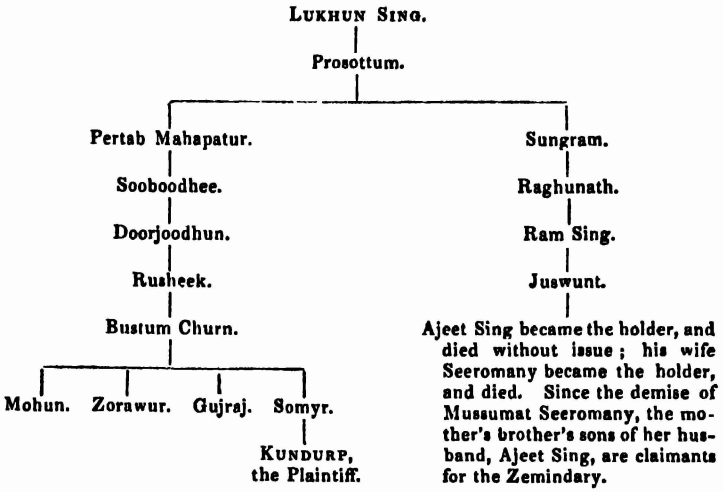
On these questions, *bewustas* were obtained from six *Pundits*.

In answer to the first question, one *Pundit* gave an opinion to the effect, that, as between a person the seventh in descent and the mother's brother's son, the former, and not the latter, would be heir, and that this was the rule both by the *Mitacshara* and by the *Daya-bhaga*. But the other five *Pundits* all concurred in stating that the rule of the *Mitacshara* and of the *Daya-bhaga* were different, and that, according to the *Mitacshara*, the seventh in descent would succeed, whilst according to the *Daya-bhaga* the mother's brother's sons would be entitled to succeed.

In answer to the second question, one of the *Pundits* of *Midnapore* stated that the *Daya-bhaga* was in force in *Midnapore*. The opinions of the other *Pundits* on the second question did not give any express opinion whether, at *Midnapore*, the rules of the *Mitacshara* or the rules of the *Daya-bhaga* prevailed.

The *bewustas* having been received by the Court, the cause was then heard at various dates in the month of *February* 1826, before Mr. *Turnbull*, the Officiating Judge of the Provincial Court of *Calcutta*, who directed a genealogical statement and questions to be submitted to the *Pundits* of the *Sudder* Court for their opinion thereon.

The genealogical statement and questions were as follows:—



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The first Question.—" According to the genealogical table given above, does the hereditary *Zemindary* (heretofore possessed by *Ajeet Sing*, and left by *Lukhun Sing*, the great ancestor, after the demise of *Rany Seeromany*, the wife of *Ajeet Sing*, and who was possessor thereof, and died) belong to the mother's brother's sons of *Ajeet Sing*, besides whom there are, apparently, no other persons, heirs, of the line of descendants of *Sungram*, the eldest son of *Prosottum Sing*, alive, or does it belong to *Kundurp Sing*, the Plaintiff, who is in the eighth remove, one of the descendants of *Pertab Mahapatur*, the second son of *Prosottum Sing*? Write out a *bewusta* on this point, according to the *Dayabhaga Sastra*."

Second Question.—" Under the circumstances above detailed, according to the *Mitacshara Sastras*, does it descend to the mother's brother's sons of *Ajeet Sing*, or to *Kundurp Sing*, above named?"

The answers of the *Pundits* of the *Sudder* Court to these questions were to the following effect:—

" According to the *Daya-bhaga*, compiled by *Jimuta*

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Vahana, if a descendant from the same ancestor in the seventh remove, and the mother's brother's son of the deceased proprietor of the property, be alive, of these two persons, the mother's brother's son has the right of succession to the property left by the deceased proprietor thereof; and, according to the *Mitacshara* compiled by *Vijnyaneswara*, of these two persons, the descendants in the seventh remove will be entitled thereto, and not the mother's brother's son."

On the 21st of *February* 1826, Mr. *Turnbull* pronounced his judgment, and after setting forth at length the proceedings and evidence, proceeded thus:—"It appears that the claim of the Plaintiff is based upon the circumstance that the *Rany Seeromany*, the wife of *Raja Ajeet Sing*, deceased, one day previous to her demise, executed an *abhishekt-pattra* of the *Zemindary* in dispute, and other property in her possession, in favour of the Plaintiff, who is a descendant of *Raja Lukhun Sing*, the great ancestor, and a *sagotra* in the seventh remove of *Raja Ajeet Sing* above named, and died the following day; therefore the Plaintiff, agreeably thereto, and on the ground of hereditary right, as being related to the *Raja* in the seventh remove, is, in accordance with the *Mitacshara* and other *Sastras* current in the province of *Orissa*, entitled to the *Zemindary* in dispute; but from the papers of the suit, the Court have no belief or faith in the correctness or genuineness of the said *abhishekt-pattra*." The judgment then set out at length the grounds for disbelieving the genuineness of the Plaintiff's alleged *ikrar-potta*, and then proceeded as follows: "Therefore no confidence can be placed in the alleged fact of the execution of the *abhishekt-pattra* in the lifetime of the *Rany*; but admitting that the *Rany* had

executed the *abhishekt-pattra* in favour of the Plaintiff, still, according to the *Sastras*, while there were heirs to *Raja Ajeet Sing*, how could it be legal and valid? and it is obvious, from the proceeding of the *Sudder Dewanny* Court, dated the 12th of *July* 1815, that, according to the *bewusta* of the *Pundits*, such an instrument, although genuine, is not sufficient nor valid, agreeably to the *Sastras*, without the concurrence and consent of the heirs of *Raja Ajeet Sing*, for a gift and bequest of the said *Zemindary*. Thus the claim of the Plaintiff, based upon the *abhishekt*, to the *Zemindary* in dispute, is in nowise well founded; consequently the consideration and decision of this suit rest upon this fact, whether the Plaintiff, who, agreeably to the genealogical table filed by himself, is in the eighth descent from *Raja Prosottum Sing*, and accordingly a *sagotra* in the seventh remove of *Raja Ajeet Sing*, the husband of *Rany Seeromany*, is hereditary according to the *Sastra*, the person entitled to the *Zemindary* in dispute, or whether the *Zemindary* in dispute appertains to *Koochil Bhoonya* and others, Defendants, who are the *bandhus*, i. e. the mother's brother's sons of the *Raja*. It is clear from the papers that, if in this suit the *Daya-bhaga* and other *Sastras* current in the province of *Bengal* be the test, no doubt whatever exists as to the right of *Koochil Bhoonya* and the other Defendants; and on the other hand, if the consideration and judgment of this suit be conducted with reference to the *Mitacshara Sastra* and other books subordinate thereto, the right of the Plaintiff predominates over that of the Defendants; for, with exception of the *Pundit* of this Court, who has recorded his opinion to the effect of the Plaintiff having no right, whether according to the *Daya-bhaga* or to the *Mitacshara*, all the other *Pundits*

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of the Courts of appeal of *Bareilly* and of *Jehangirnagur*, and of *Zillah Midnapore*, whose *bewustas* have been received agreeably to a call made by the former Senior Judge of this Court, concur in this point: that the Plaintiff is entitled to the *Zemindary* according to the *Mitacshara* and other books subordinate thereto, and that the Defendants are entitled to it according to the *Daya-bhaga*, &c., current in *Bengal*; and further, the *bewusta* of the *Pundits* of the *Sudder Dewanny* Court, which, in consequence of the incompatibility between the opinion of the *Pundit* of this Court and the opinions of the *Pundits* of other Courts, was called for by me, is affirmatory of the *bewustas* given by the *Pundits* of the Courts above named; but this fact does not at all assist the views of the Plaintiff, because the allegations of the Plaintiff in respect to the use of the *Mitacshara Sastras* in his family, in order to establish his claim, are, in my opinion, altogether inaccurate, and have not in any way been proved, and no dependence can be placed upon the depositions of the witnesses who have given evidence on this point." The judgment then finally declared that the claim and alleged rights of the Plaintiff to the *Zemindary* in dispute, had not in any way been proved and established, and ordered that the suit be dismissed, with costs.

The Plaintiff presented a petition to the *Sudder Dewanny Adawlut* of *Bengal*, for leave to appeal from this decree, *in formâ pauperis*, which the *Sudder* Court, pursuant to Reg. XXVIII. of 1814, permitted.

Pending the appeal before the *Sudder* Court, and on the 28th of *February* 1830, *Mohun Lal Khan* died, leaving two widows, *Rany Koond Luta* and *Rany Rung Luta*, the present Respondents, and five sons, named *Ajodhya Ram Khan*, *Ram Jy Kkan*, *Birjkishor*

Khan, *Ram Chunder Khan*, and *Hurdy Ram Khan*, all minors, surviving. After investigation, the names of the *Ranys* were recorded in succession to the deceased, and the appeal defended in their names.

The appeal came before Mr. *Alexander Ross*, one of the Judges of the Court, who, on the 21st of *August* 1830, recorded his opinion, that it seemed proper to ascertain from the *Sastras*, whether the *la-davi*, executed by the mother's brother's sons excluded the claim of the Plaintiff. It was, therefore, ordered, "that a copy of this proceeding, together with the *bewustas* filed in the suit of *Roop Churn Mahapatur* v. *Mohun Lal Khan*, and in the suit, *Mohun Lal Khan* v. *Rany Seeromany*, be made over to the *Pundit* of this Court, with this order, that, after a perusal thereof, he file a reply to the following question, agreeably to the *Daya-bhaga Sastras*, current in the family of *Raja Ajeet Sing*, within a period of four days, after he may receive the question."

Question.—"It is established by the *bewustas* alluded to, and the decrees of this Court, in the suits referred to, that, according to the *Daya-bhaga Sastras*, current in the family of *Raja Ajeet Sing*, after the demise of *Rany Seeromany*, the wife of *Ajeet Sing*, the property in dispute left by the *Raja* and *Rany* referred to, will descend to the mother's brother's sons of *Raja Ajeet Sing*, who are the nearest heirs, and entitled thereto, and that they being forthcoming, the *sagotra* cannot become the heir; and it is proved by the papers, that the mother's brother's sons, notwithstanding that they were the rightful owners of the property in dispute after the demise of *Rany Seeromany*, agreeably to the *bewustas* of the former *Pundits* and the decrees of this Court, relinquished the property to the possession of

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Mohun Lal Khan, and executed *la-davi* thereof in his favour. It is, therefore, inquired whether the mother's brother's sons, the subscribing parties to the *la-davi*, who are the nearest heirs of *Raja Ajeet Sing*, and the persons entitled to the *Zemindary* in dispute, after the demise of the *Rany Seeromany*, notwithstanding that there are descendants of the brother of the great-grandfather of *Ajeet Sing*, who are *sagotras*, have, or have not, the power to execute a *la-davi*, on account of the property in dispute, in favour of *Mohun Lal Khan*, who is an alien, without retaining any portion of the said property under their own control, or reserving a portion thereof, for the purpose of performing *sradh*, and as a means of maintenance to themselves, and whether the said *la-davi* will be injurious to the rights of the Appellant, who is a *sagotra*, or not?"

The Hindoo law-officer of the Court, on the 8th of *September* 1830, returned his answer to the above question, in the following terms:—

"If the mother's brother's sons executed the *la-davi* (or deed of relinquishment), and who are the nearest heirs of *Raja Ajeet Sing*, and the persons entitled to the matter in dispute, or the assessed lands belonging to him after the demise of *Rany Seeromany*, while there are living descendants of the brother of the father of the great-grandfather of *Ajeet Sing*, who are *sagotras*, without retaining a portion thereof, or reserving any portion thereof, for the purpose of performing *sradh*, and as a means of maintenance for themselves, in favour of *Mohun Lal Khan*, who is an alien, in such case the execution by them of the *la-davi* on account of the matter in dispute, without retaining any portion thereof, being contrary to law, as involving a *vritti*

lopa, or a deprivation of the means of support, and a moiety thereof not having been retained for the purpose of *sradh*, or annual rites of the deceased *Ajeet Sing*, and a gift of the whole (property) while there are descendants, being forbidden and contrary to usage, whether the person from whom one inherits be living or not, therefore the gift by deed of relinquishment of the assessed lands is not according to law; yet according to the *Daya-bhaga* current in the family of *Raja Ajeet Sing*, they may voluntarily make an illegal gift with the concurrence and advice of their sons, &c., without force, fear, and fraud, and notwithstanding the existence of a *sagotra*, or the brother of the father of the great-grandfather of *Ajeet Sing*, in favour of *Mohun Lal Khan*, an alien; therefore they are able to give a deed of relinquishment of the assessed lands, &c., because the mother's brother's sons of *Ajeet Sing* are the nearest heirs to the said *Raja*, and the children of the brother of the father of the great-grandfather of *Raja Ajeet Sing*, or the Appellant, is like an alien, and cannot forbid the execution of a deed of relinquishment, by the mother's brother's sons; therefore the assessed lands in dispute having descended to his mother's brother's sons hereditarily, and the control of a person to whom anything has descended by hereditary right is apparent to everybody; but by that law the donor will be held to have committed a sin. Therefore, if they had retained anything, or a moiety of the assessed lands, for the performance of *sradh* (or funeral rites), and also a portion of the said lands, to provide food and raiment for those who are entitled thereto, they can make a gift by a deed of relinquishment to *Mohun Lal Khan*, a stranger, while they are in a sound state

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of mind, and voluntarily, and without force or fear or fraud, &c., and with the consent of children and neighbours; in the event of their retaining a portion merely for the sake of the honour of the thing, they can make a gift while in a sound state of mind, &c., as above mentioned; but as this kind of retention is not like retaining at all, it will be the sin of the donor. By the mother's brother's sons of *Ajeet Sing*, who are his nearest heirs, making a gift by a deed of relinquishment of the property left by *Ajeet Sing*, the assessed lands which descended to him hereditarily, to a stranger, *Mohun Lal Khan*, no injury arises to the *sagotra* or the brother of the father of the great-grandfather of *Ajeet Sing*, viz., the Appellant, because he had no advantage before; for while the mother's brother's sons exist, the *sagotra* has no right. This *bewusta* is agreeably to the *Daya-bhaga* and other books current in the family of *Raja Ajeet Sing*."

The appeal came on for hearing before Mr. *Alexander Ross*, one of the Judges of the *Sudder* Court, on various dates, and on the 30th of *October* 1830, that Judge pronounced the decree of the Court, the material portion of which was in the following terms:—"It is manifest from the *bewusta* of the *Pundit* of this Court, that the claim of the Appellant in respect to the property in dispute left by *Raja Ajeet Sing*, and *Rany Seeromany* his wife, is in nowise well founded, and that the mother's brother's sons of *Raja Ajeet Sing* above named, who are his nearest heirs, had the option of executing a *la-davi* on account of the property in dispute, in favour of *Raja Mohun Lal Khan*; under these circumstances, and with advertence to the argument adduced in the decree of the Provincial Court,

in my opinion the decree of the Court to the effect of dismissing the claim of the Appellant is right and proper, and affirmable."

It was, therefore, ordered, and finally decreed, that the appeal of the Appellant should be dismissed, and the decree of the Provincial Court of *Calcutta* affirmed and maintained, with costs.

Kundurp Sing was dissatisfied with this decision, and, on the 8th of *December* 1830, filed a petition, praying for leave to appeal therefrom, to His late Majesty in Council, *in formâ pauperis*, pursuant to sec. xviii. of *Bengal* Reg. XXVIII. of 1814. The prayer of this petition was, after a reference to the *Sarrishtahdar* as to the practice of admitting appeals to *England*, *in formâ pauperis*, granted, and the Appellant admitted to appeal to *England*, *in formâ pauperis*.

After the admission of the appeal, *Kundurp Sing* died, without leaving issue male, and the appeal was revived by his widow, *Rany Srimuty Dibeah*, the present Appellant, and now came on for hearing.

The Appellant prayed the reversal of the *Sudder* Court's decree, for the following reasons :—

I.—Because, after the death of *Rany Seeromany*, the paternal uncles of *Kundurp Sing* were entitled to succeed to the *Raj* or *Zemindary* as the heirs of *Raja Ajeet Sing*, and in consequence of the renunciation, by those uncles, of all their claims in his favour, *Kundurp Sing* became entitled to the *Raj*.

II.—Because *Kundurp Sing* was legally constituted by the *Rany*, in her lifetime, her successor to the *Raj*.

The Respondents, the widows, *Rany Koond Luta* and *Rany Rung Luta*, on the other hand, relied on the following reasons :—

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I.—Because the *Ikrar-nama*, or deed of gift, set up by the Appellant's husband, was a forged and fabricated instrument, and, even if genuine, would have been void and inoperative.

II.—Because the Appellant's husband did not prove his alleged relationship to *Raja Ajeet Sing*.

III.—Because if he had proved his alleged relationship to *Raja Ajeet Sing*, he would not have been entitled to the succession, according to the usages of the *Raja's* family, and the *Sastras* in use at *Midnapore*.

The other Respondents, *Lukhi Narain Bhoonya*, *Soondur Narain Bhoonya*, and *Madhoosoondhun Bhoonya*, the representatives of *Bulbhudder Bhoonya*, deceased, and *Radha Govind Bhoonya*, deceased, supported the decree for the following reasons:—

I.—Because, according to the *Daya-bhaga* and other *Bengal* authorities, (which they contended regulated the succession to the property in dispute,) the Respondents were entitled to succeed thereto, as the heirs-at-law of the deceased *Raja Ajeet Sing*.

II.—Because the *Ikrar-nama*, alleged to have been executed by *Rany Seeromany*, and under which the Plaintiff claimed, was a forged and fabricated instrument, and, even if genuine, would, in the absence of their consent, have been inoperative and void in law.

Mr. *Buller*, Q. C., Mr. *Jackson*, and Mr. *Forsyth*, for the Appellant; and

Mr. *Wigram*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for both sets of Respondents.

The authorities referred to, were, *Mohun Lal Khan*

v. *Rany Seeromany* (*a*). *Keerut Sing* v. *Koolahul Sing* (*b*). *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (*c*). *Rany Pudmavati* v. *Baboo Doolar Sing* (*d*). *Rajchunder Naraen Chowdry* v. *Goculchund Goh* (*e*). *Aulim Chund Dhur* v. *Bejai Govind Burrall* (*f*). 1 *Strange's* Hindoo Law (2nd Edit.), 318. 2 *W. Macnaghten's* Hindoo Law, 19.

Lord LANGDALE:

16th Dec. 1847.

This is an appeal from a decree of the *Sudder Dewanny Adawlut* of *Calcutta*, dismissing the suit of *Kundurp Sing*, deceased, for recovery of a *Zemindary* of four *pergunnas*, in the *Zillah Midnapore*, from *Mohun Lal Khan*, deceased.

The appeal is prosecuted by the widow and representative of *Kundurp Sing*, against the two widows and representatives of *Mohun Lal Khan*, and others.

The case is as follows:—

On the 1st of *July* 1800, the *Rany Seeromany* being the sole possessor of the *Zemindary* in question, as the surviving widow, and heir of her deceased husband, *Raja Ajeet Sing*, (who died in 1754,) executed a deed purporting to be a deed of gift of the *Zemindary* to *Anund Lal Khan*.

The gift was opposed by *Shamanuna Gujraj*, *Roop Churn*, and *Ram Churn*, who claimed to be the heirs of *Raja Ajeet Sing*. They presented a *durkhast* in support of their application, but the *durkhast* was rejected, and the donation was registered and proclaimed.

(*a*) 2 Ben. Sud. Dew. Reps., 32.
(*b*) 2 Moore's Ind. App. Cases, 331.
(*c*) 2 Moore's Ind. App. Cases, 132.
(*d*) Ante, 259.
(*e*) 1 Ben. Sud. Dew. Reps., 43.
(*f*) 6 Ben. Sud Dew. Reps., 224.

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The *Rany* was herself a party to this proceeding, and, in her answer to the opposition, admitted the deed of gift, which she had made. But some time afterwards she complained of, and disputed, the deed, and in 1806 she commenced a proceeding of her own, to recover possession of the *Zemindary* from *Anund Lal Khan*. In this proceeding she was nonsuited, but by leave of the Court she commenced a proceeding to set aside the gift, on two grounds: first, that it had been obtained from her by fraud; and secondly, that it had been executed without the consent of the heirs of *Raja Ajeet Sing*, her husband, and of her guardians.

In the course of these proceedings, it was held, that the male heirs of the *Raja Ajeet Sing* were the guardians or protectors of the widow, but that the mother's brother's sons of *Raja Ajeet Sing* were the heirs expectant or presumptive to the *Zemindary*. And by the decree of the *Sudder Dewanny Adawlut*, dated the 31st of *August* 1812, on the appeal from the decree of the First Judge of the *Calcutta* Provincial Court, dated the 30th of *March* 1811, it was stated, that it could not be ascertained whether the deed of gift was obtained from the *Rany* by deceit, as she alleged; but that it appeared, by a *bewusta* of a *Pundit* of the Court, and the text of the *Sastras* cited therein, also from the tenor of the 11th chapter of the *Daya-bhaga*, which was the most reputable of all the *pothees* in use in *Bengal*, which are observed in the families of the litigating parties, that after the death of *Raja Ajeet Sing*, his relatives, descended in the male line, who were living, and capable of taking care of the *Rany*, were *Pirbhoo*, that is, her guardians or protectors, and that, without their advice and consent, she had not, according to the *Sastras*, the power of making a gift to any one,

of the *Zemindary* left by her husband. It was further stated, that although, agreeably to the *Sastras* in use in *Bengal*, the persons who claimed to be male heirs of *Raja Ajeet Sing* could not be considered his heirs, when opposed to his mother's brother's sons; and although *Mohun Lal* (claiming under *Anund Lal*, and then Defendant) had produced deeds purporting to have been executed in his favour by some of the persons who represented mother's brother's sons of *Raja Ajeet Sing*, yet there was no proof, either of the permission of his relatives, descended in the male line, or of the approbation of all the relatives descended from the mother's brother's sons, and the deed itself did not show that any one of them had approved at the time of the execution; and for these reasons it was held that the deed was not valid.

From this decision, *Mohun Lal* appealed to *England*.

There being no question as to the *Sastras* in use in the family, the opinion of the Judge, that the deed was not valid, without the consent of the relations descended in the male line, as guardians, and that the concurrence of the heirs (the descendants of mother's brother's sons) at the time of executing the deed, was necessary to the validity of the deed, were the principal points upon which the decision adverse to *Mohun Lal* was founded, and must have been the grounds of the appeal.

The appeal was not prosecuted, and the death of the *Rany* (which soon afterwards took place) gave rise to a new claim, in new circumstances.

The estate was in the possession of the Collector of *Midnapore*, or of the Court of Wards.

Independently of any deed of gift, the descent was

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cast upon the heirs of *Raja Ajeet Sing*, which, according to the *Daya-bhaga*, and the *Sastras* in use in *Bengal*, were the descendants of the mother's brother's sons, but which, according to the *Mitacshara*, were the male descendants of a distant ancestor of *Raja Ajeet Sing*.

The *Rany* died on the 17th of *September* 1812. Immediately afterwards, *Kundurp Sing*, who is now represented by the Appellant, alleged that, on the day before her death, she had executed to him a deed of gift of the *Zemindary*, and he, as donee under that deed, and also alleging himself to be heir of *Raja Ajeet Sing*, claimed to be entitled to the possession of the *Zemindary*. *Mohun Lal Khan* also claimed to be entitled to the possession, founding his claim on the deed of gift to him, and the confirmation of it before that time, by all the persons whom he alleged to be the heirs of *Raja Ajeet Sing*.

On the 25th of *September* 1812, it was ordered, by the Court of *Zillah Midnapore*, that *Mohun Lal Khan*, and *Kundurp Sing*, and any other persons having claims to the possession of the *Zemindary*, either by inheritance or any other right, should present petitions to the Judge of the *Zillah*. *Mohun Lal Khan*, and *Kundurp Sing*, and others, having, accordingly, presented their petitions, the Judge proceeded to a summary trial thereof, and, on the 24th of *December* 1813, recorded his opinion as follows:—First, That the deed under which *Kundurp Sing* claimed, was fabricated, after the death of the *Rany*, and that the right of *Kundurp Sing* to the property was not proved or established, either by deed or by hereditary right, according to the *Sastras*. Secondly, That, according to the *bewusta* entered in the decree of the 31st of *August* 1812, the sons of the

brother of the mother of *Raja Ajeet Sing* were his heirs, and, after the demise of the *Rany*, entitled to the *Zemindary*. Thirdly, That those heirs had transferred their hereditary rights in the property to *Mohun Lal Khan*. But, fourthly, notwithstanding these circumstances, the appeal of *Mohun Lal Khan* to *England* being pending, the Judge thought it proper that the *Zemindary* should remain in the custody of the Court of Wards, until the appeal to *England* should be decided.

This proceeding having been transmitted to the *Sudder Dewanny Adawlut* for information and orders, that Court, on the 14th of *February* 1814, after noticing the reasons for not prosecuting the appeal, and that the authority of the Court of Wards had ceased, considered it to be right and proper that the Judge of the *Zillah* Court should give effect to his summary decision; and if, on consideration of the particulars set forth in his proceedings of the 24th of *December* 1813, he conceived *Mohun Lal Khan* to be the person entitled to the *malik* of the *Zemindary*, and if *Mohun Lal Khan* were able to give security for conforming to the decrees of the Court, or other claims, the Judge might withdraw the *Zemindary* from the custody of the Court of Wards, and put it into the possession of *Mohun Lal Khan*.

Mohun Lal Khan obtained possession, in the result of these proceedings. *Kundurp Sing* appealed to the *Sudder Dewanny Adawlut*, and, continuing to claim both, as donee under this deed, and also as heir of *Raja Ajeet Sing*, prayed a review of the judgment against him. But the Chief Judge of the *Sudder Dewanny Adawlut*, on the 12th of *September* 1815, considered that, as in the summary decision given in the cause, permission was granted to any person who had, according to the *Sastras*, claim to the *Zemindary* left

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by *Raja Ajeet Sing*, to sue for the same in the Provincial Court, in order that, after a full and final inquiry, (ascertaining, at the same time, the rule observed in the family, and the *Sastras* that were in force,) the right be awarded to the owner: it was not necessary or useful to make any further investigation in the summary cause, and the petition of the Appellant, praying a review of the decision, was not allowed.

In consequence of this decision, *Kundurp Sing*, in *November* 1815, commenced his action against *Mohun Lal Khan* and others, in the Provincial Court of *Calcutta*, to recover possession of the *Zemindary*. He claimed, as before, to be entitled, under the deed of gift, of the 16th of *September* 1812, and also as heir by descent, in the male line. He admitted that he had four uncles who were more nearly related than himself, but he alleged that they were satisfied with his being proprietor of the *Zemindary*, and had relinquished and consigned to him all their rights to the *Zemindary*.

Mohun Lal Khan, by his answer, alleged that the deed of gift under which *Kundurp*, the Plaintiff, claimed, was a forgery; and that, according to the *Sastras*, the Plaintiff could not in any way be entitled to the *Zemindary*; and he insisted, in substance, that the *Sastras* in use in *Bengal*, and not the *Mitacshara*, were the authority according to which the persons who were the heirs of *Raja Ajeet Sing* were to be determined.

The suit was the subject of great litigation, many witnesses were examined, and the reports or opinions of several *Pundits* were obtained and considered. The decree of Mr. *Turnbull*, in the Provincial Court, was pronounced on the 21st of *February* 1826. He determined that the claim of the Plaintiff, founded on the deed of gift, could not be supported; and that, if it

had been genuine, it could have no effect, for the want of the consent and concurrence of the heirs. And considering the Plaintiff's claim, in the character of heir of *Raja Ajeet Sing*, he stated it to be clear, that if, in this suit, the *Daya-bhaga*, and other *Sastras* current in *Bengal*, were the test, there was no doubt as to the right of the Defendants; but that, on the other hand, if the judgment was constituted with reference to the *Mitacshara Sastra*, and other books subordinate thereto, the right of the Plaintiff preponderated over that of the Defendant; and, on a consideration of the whole case, the Judge expressed his opinion that the alleged rights of the Plaintiff had not, in any way, been proved or established, and he ordered that the Plaintiff's suit be dismissed, with costs.

From this decree, the Plaintiff appealed to the *Sudder Dewanny Adawlut*. The appeal was heard before Mr. *Ross*, and, on the 30th of *October* 1830, he pronounced his decree, and thereby, after referring to the evidence, and the *bewustas* of the *Pundits*, he dismissed the appeal of the Plaintiff, and affirmed the decree of the Provincial Court, dismissing the Bill.

From that decree, the present appeal is presented.

There were three questions in the cause: First, Was the Plaintiff's deed of gift genuine? Secondly, If genuine, was it valid? Thirdly, If genuine, and not valid, was the Plaintiff entitled, as heir?

But, as the validity of the deed, even if it was genuine, depends on the concurrence of the heirs, the two last questions depend upon the single question—who were the heirs? And if the persons alleged by the Plaintiff to be heirs, were not heirs, the deed, even if genuine, would not be valid. For this reason, it is not strictly necessary for us to give any opinion upon

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the question, whether the deed was genuine or not. But, considering the circumstances in which the deed is alleged to have been executed, by the *Rany*, on the day before her death, the witnesses stated to have been then present, the length of time during which *Kundurp*, though often called upon, neglected to produce the deed, and the whole of the evidence in the cause, we think it right to state our concurrence in the opinion which has been entertained by every Judge who has considered the case, that the deed is not genuine, but a forgery; and, consequently, that the Plaintiff could establish no claim under it.

The question, whether the descent in this family is to be regulated by the *Daya-bhaga* and the *Sastras* in use in *Bengal*, or by the *Mitacshara*, is really the only one to be considered.

Now, in the long litigation in which the *Rany Seeromany*, under whom *Kundurp Sing* claimed, as donee, was engaged with *Mohun Lal Khan*, it was, without any objection on her part, allowed by her *Vakeels*, and assumed and held by the Court, that the descent of this *Zemindary* was regulated by the *Sastras* in use in *Bengal*. The whole proceeding was conducted on that footing, and the decision in favour of the *Rany* was founded expressly on the ground, that the deed then in question was executed without the concurrence of the descendants in the male line, who (though they were not heirs) were guardians or protectors of the widow.

After the death of the *Rany*, *Kundurp* himself alleged that the suit between *Mohun Lal Khan* and the *Rany* had been decided in her favour, agreeably to the *Sastras* and the customs of the family; and, in the present case, it was shown that decisions affecting lands in *Midnapore* were founded on the *Sastras* in use in

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Bengal. Several *bewustas*, in other cases, were produced; and from the *bewustas* obtained in this cause, and the other evidence on behalf of the Defendants, we think that, although the evidence is, in some respects, inconsistent, there is, on the whole, quite sufficient reason to conclude that the *Daya-bhaga*, and not the *Mitacshara* and *Sastras*, ought to be applied to the decision of this cause, and we shall, therefore, report to Her Majesty, that, in our opinion, the appeal ought to be dismissed, and the decree of the *Sudder Dewanny Adawlut* affirmed, with costs.

RAJA BURDAKANTH ROY - - *Appellant*,

AND

ALUK MUNJOOREE DASIAH, PREM CHUND, and RAM DIAL BOSE - } *Respondents.**

On Appeal from the Sudder Dewanny Adawlut at Bengal.

16th, 17th, & 18th Feb. 1848.

IN this case, the suit was instituted, on the 13th of *July* 1826, in the Provincial Court at *Calcutta*, by

Lease for a term of years, of a *pergunna* in *Bengal*, to A., to which B. became surety for the due performance of the conditions, and afterwards a co-partner with A. in the lease. Before the expiration of the demised term, the representatives of the lessors evicted the lessee from the *pergunna*. Held that a suit would lie by B.'s representatives against the lessors' representatives, for ouster from the lease, although they were not parties to the contract with the original lessors.

Damages assessed at a gross sum by the Judicial Committee, no sufficient evidence being furnished in the cause, to calculate the exact amount of the loss sustained.

* Present: Members of the *Judicial Committee*,—Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

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Narayun Sing and *Ram Tunnoo Bose*, *Ram Dyal Bose*, and *Deb Narayun Bose*, the heirs and representatives of *Ram Nursing Bose*, against one *Jugmohun Das Moonshi*, then manager of the estate of the Appellant, the minor son of *Raja Banikanth Roy*, deceased, *Raja Gopee Nath Roy*, and the Collector of *Jessore*, to recover Rs. 65,835. 15., 3., as the amount of profits alleged to have been derived from the *pergunna Syedpoor*, during the period of four years, viz., from the *Bengal* year 1228 to 1231, part of the term of the lease of that *pergunna*.

The lease of the *pergunna* had been granted in *March* 1816, by *Raja Banikanth Roy* and *Raja Gopee Nath Roy*, the joint *Zemindars* and proprietors of the *pergunna*, to *Narayun Sing*, for a period of ten years. *Ram Nursing Bose* was security for the lessee, for the due performance of the conditions of the lease. He was also co-partner with *Narayun Sing* in the lease.

The Appellant was the heir and representative of *Raja Banikanth Roy* and *Raja Gopee Nath Roy*, his father and uncle, the lessors. The Respondents represented *Ram Nursing Bose*, the partner in the lease with *Narayun Sing*. The other parties to the suit had died, except *Narayun Sing*, who withdrew from the suit soon after it was commenced.

The nature of the lease, and the circumstances which led to the lessee being dispossessed of the *pergunna*, are fully stated in the judgment of their Lordships.

Mr. *Turner*, Q. C., Mr. *Jackson*, and Mr. *Fulton*, in support of the appeal, relied on the following reasons:—

I.—Because the ancestor of the Appellant con-

tracted with *Ram Narayun Sing* alone (*Ram Nursing Bose* being only the surety for the due performance, by *Narayun Sing*, of the conditions of the lease) ; and as, therefore, there was no contract or privity between the Appellant and *Ram Nursing Bose*, or his representatives, the latter were not competent to institute the present suit.

II.—Because *Ram Nursing Bose*, being the surety for the lessee, was incompetent to participate in the profits of the lease.

III.—Because *Narayun Sing*, having permitted the Government revenue to fall into arrear, the Collector was justified in resuming, and bound to resume, the lease, under the terms of the engagement and *dowl* of the 9th of *April* 1816.

IV.—Because the debts specified in the agreement, not having been paid off by *Narayun Sing*, according to the terms of the lease, he was, therefore, not entitled to retain possession of the *Zemindary*.

V.—Because the estate being let in farm, and the property of a minor, and, therefore, not liable to sale for arrears of the Government revenue, the Collector was bound to obtain good security for the payment of such revenue ; and because the question of the sufficiency or insufficiency of the security tendered, was purely within the discretion of the Collector or fiscal authorities, and that discretion was honestly and properly exercised.

VI.—Because if the Respondents were entitled to any relief in this suit, there was no evidence to show that they were entitled to more than four-sixteenth shares in the benefit of the lease, inasmuch as it appears that *Bishonath Bose* and *Ram Dhun Bose*, who were not parties to this suit, would, in such case, be entitled to eight-sixteenth shares.

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VII.—Because the farmer was entitled to a moiety of the increased profits arising from the *Zemindary*, only in case of the same being recovered through his own "means and endeavours;" and the Court decreed payment to the Respondents, of the augmented profits obtained under the management of the Collector, and in no respect by the "means or endeavours" of the lessee.

Mr. *Wigram*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondents, contended that the decree appealed from, was proper, for the following reasons:—

I.—Because the dispossession of the lessees from the *Pergunna Syedpoor*, before the expiration of the term granted by the lease, was unjust, and contrary to law; and the lessees, and those claiming under them, became entitled to recover the amount of damages occasioned thereby.

II.—Because, in the circumstances of the case, the Plaintiffs were justly entitled to demand from the Appellant, or his estate, compensation for the loss occasioned to them by their ouster from the *pergunna*, and the amount awarded by the decree of the *Sudder Adawlut* did not exceed, and in fact did not equal, the sum which they were justly entitled to claim.

The cases and authorities referred to, were, *Maharaja Tej Chund Bahadur* v. *Sri Kanth Ghose* (*a*). *Koonjbehary Lal* v. *The Government* (*b*). *Coleb.* Dig.,

(*a*) 3 Moore's Ind. App. Cases, 261.
(*b*) 3 Ben. Sud. Dew. Reps., 85.

226, 228, 250, 254. 1 *Strange's* Hindoo Law, 229 (2nd Edit.). *Bengal* Regulations, II. of 1793, secs. 36 & 37; VI. of 1822.

The Right Hon. T. PEMBERTON LEIGH:

24th Feb. 1848.

This was an action brought by the Respondents, against the Appellant, to recover damages for the loss alleged to have been sustained by the former, through the wrongful act of the Appellant. The wrong complained of, was the ouster of the Respondents, from certain leases, in which they alleged themselves to have been interested, under a grant made by the ancestors of the Appellant.

In 1816, the father and uncle of the Appellant held the *Pergunna* of *Syedpoor*, in the district of *Jessore*, as *Zemindars*, subject to the payment to the Government, of an annual revenue of Rs. 13,296.

The revenue had fallen into arrear. The *Zemindars* were involved in debt to a large amount, and in order to raise a sum of Rs. 54,000, they agreed to grant a lease to a person, named *Narayun Sing*, of the *Pergunna* of *Syedpoor*, he undertaking to raise the required loan, and to pay the amount by instalments, out of the rent of the *pergunna*.

Narayun Sing appears to have been connected with a family of the name of *Bose*: one of this family, *Ram Dhun Bose*, was a banker, and from him and his partner this loan was intended to be raised.

The first document connected with this transaction is dated 30th of *March* 1816. It is a memorandum signed by *Narayun Sing*, and addressed to the *Rajas*. The effect of it is, that *Narayun Sing* is to receive the rents of the *pergunna*, of which the profits payable to the lessees, after discharging the revenue to Govern-

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ment, are stated to amount to Rs. 13,100, and of this, Rs. 7,000 per annum are to be paid to the bankers, leaving Rs. 6,100 for the *Rajas*. Out of this sum, Rs. 105 are to be deducted by way of allowance to *Narayun Sing*, leaving Rs. 5,995 for the *Rajas*. If anything further can be received from the *Ryots*, one half is to be paid to the *Rajas*. If on examination of the Roll and papers, and inquiry in the district, the rent is found to be less than it is rated at by the parties, an allowance is to be made to *Narayun Sing*.

On the 9th of *April*, a corresponding document is signed by the *Rajas*, and addressed to *Narayun Sing*: on the same day, a grant is made by the *Rajas*, to *Narayun Sing*, of the *pergunna* in question, for a period of ten years, which is obviously intended to be in conformity with the agreement of the same date.

On the 12th of *April*, a corresponding document, or, as we should call it, a counterpart of the lease, is signed by *Narayun Sing*. The material portion of it is in these terms: "This agreement has been written by *Narayun Sing*, in the year 1222. You have given me a lease of the entire *pergunna* of *Syedpoor*, your *Zemindary*, upon my application, from the year 1223 to the end of 1232, for a term of ten years. I do hereby voluntarily give this engagement of my own accord, that I shall have possession in the district, and pay the annual rent according to the Roll, after deducting the expenses of management and servants' allowance, at *Chaneda*, in the sum of S. Rs. 56,397, of which I shall pay the revenue of the *pergunna*, fixed in the Collectorate, the sum of Rs. 43,296. 3a. 10g. 2k., according to instalments, monthly, into the Collector's treasury, and deliver to you receipts under the

seal and signature of the Collector, and receive receipts from you." It then provides for the payment of Rs. 7,000, to the bankers, and the Rs. 6,100 to the *Rajas*, omitting the allowance of Rs. 105, which was provided to be made by the agreement with *Narayun Sing*.

From these documents, the mode in which the rent is estimated sufficiently appears. Discarding from consideration, for the present, the sum of Rs. 11,792, to which we shall afterwards advert, the produce of the estate is calculated, after deductions, at Rs. 58,692. From this is allowed, for expenses of management, Rs. 2,295, leaving for actual rent Rs. 56,397, omitting the smaller denominations of coin.

Ram Nursing Bose became surety for the due performance of the engagement of *Narayun Sing*.

On the 29th of *April* 1816, a memorandum is made between *Ram Nursing Bose*, *Ram Dhun Bose*, and *Narayun Sing*, by which their interests, as partners with him in the lease, are recognized; *Ram Nursing Bose* having a four-*anna* share.

In the end of the year 1816, it was represented by *Narayun Sing*, that the income of the estate was less than it had been represented, according to the Roll, and that after deducting the sums allowed for management, and also a sum of Rs. 105, (which had been mentioned in the agreement, which preceded the lease, but had been omitted in the lease itself,) the net rent, instead of Rs. 56,397, would be only Rs. 54,981. Thereupon this memorandum is signed by *Narayun Sing*; and *Ram Nursing Bose*, as surety, is a party to it: which agreement is simply to reduce the rent in the manner pointed out in the memorandum.

It is clear that, at this time, there was no profit upon the lease; that is, no recognised or legitimate profit,

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beyond that which might arise from the large allowances for management.

Previously to the year 1819, by the death of one of the *Rajas*, and a transfer of his interest by the other, the *pergunna* in question became vested in the Appellant. The new owner being a minor, the property came under the care of the Court of Wards; a Court which appears to have a double jurisdiction, the guardianship of infant estates, and the protection of the public revenue.

In *July* 1820, the Collector of the district where this property was situate, examined into the circumstances of the minor's property, and the conditions of this lease. It appeared to him (not, perhaps, very unnaturally), that this lease was most detrimental to the infant, and he considered that it contained much evidence of fraud and oppression practised by the lessee towards the lessor; and, in a letter addressed by him to the Court of Wards, on the 1st of *July* 1820, he advised that the Court, as of their own authority, should annul the transaction, and make a new lease of the property.

The Court of Wards, however, considered that this proceeding would not be justifiable, and that the existing arrangement could only be set aside, by a suit instituted by the minor, for that purpose. They wrote a letter to this effect to the Collector, on the 11th of *July* 1820, recommending, that if a new arrangement could be made, with the assent of the lessees, it should be done. They conclude their letter with this paragraph:—"As the Court are of opinion that the settlement of *Syedpoor*, formed by the late *Raja*, cannot be disturbed, it will be necessary to require the farmers to give security for the fulfilment of the existing en-

gagement, or those which they may assent to, under the preceding instructions; at all events, the regular liquidation of the Government revenue must be secured."

In *November* 1820, the Government consented to advance two *lacs* of rupees to the Court of Wards, to enable them to pay off the incumbrances on the minor's estate.

On the 2nd of *February*, the Collector wrote to *Narayun Sing*, and required him to come to a settlement, upon fair terms, for the property which he held, giving him notice that if he refused to do so, the money due on the mortgage should be paid off, and the lease annulled.

What was done upon this does not appear, further than that *Narayun Sing* did not consent to make any new arrangement.

The *Bengal* year 1227 terminated in the month of *April* 1821, and the only evidence we have of what took place, is a statement in a letter of the Collector, to the Court of Wards, of the 5th of *July*. From this it appears, that, in the beginning of the year 1228, which would mean in *April* or *May* 1821, he called upon *Narayun Sing* to give the security required by the last paragraph of the letter of the 11th of *July* 1820, and, at the same time, issued a proclamation to the *Ryots*, prohibiting them from paying any revenue to the farmers, until such security should be tendered and accepted.

It is said that, at this time, the revenue was in arrear. The Judges in the Court below appear to have considered that this was not the fact. There does appear to be evidence, then, that about two months' revenue was unpaid at the end of the year 1227. No

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demand, however, seems to have been made for payment, and it is not at all referred to as the ground on which security was required, or on which the lease was to be attached.

On the 20th of *June* 1821, notice was given to *Narayun Sing* that, unless he furnished security, the lease would be attached. Several persons were, accordingly, proposed as sureties by *Narayun Sing*; amongst others, a person named *Bunmally Bose*. They were all, however, rejected by the Collector, who, on the 5th of *July* 1821, communicated what he had done to the Court of Wards, in the following letter:—"It appearing that the farmers of *Pergunna Syedpoor* have never furnished the security required by the last paragraph of your predecessor's letter, of the 5th of *July* last, I beg leave to acquaint you that, previously to allowing them to commence the collections of the present year, and with the view of securing the regular payment of the revenue of the Government, I called upon them to furnish the security required; and, at the same time, I issued a proclamation to the *Ryots*, prohibiting them paying revenue to the farmers until such security should be tendered and accepted. *Narayun Sing*, the recorded farmer of *Syedpoor*, has offered, as his security, the five persons noted in the margin; but as they are all sharers with him in the farm, I have rejected their security. The security of *Bishonath* and *Bunmally Bose* is, besides, inadmissible for other reasons, as the former is security, to a large amount, for the treasurer of this office, and also for one of the record-keepers." Then it mentions the objections to other parties. Then he says, "A period of fifteen days having elapsed since the issuing of the above order, and no other security

having been tendered by the farmer, I beg leave to propose that, as the collections of the year are at a stand, the *pergunna* be immediately attached."

On the 6th of *July*, the day after this letter, he served a further notice on *Narayun Sing*, in these terms:— "Be it known to *Narayun Sing*, farmer of the *Pergunna* of *Syedpoor*, that you have often been required to furnish good security; you have not yet furnished it; if you intend to furnish good security, you are to attend at ten o'clock to-morrow, with good security. Consider this as peremptory."

On the 17th of *July*, the Court of Wards wrote as follows to the Collector:—"I am directed to acknowledge the receipt of your letter of the 5th instant. Unless the farmers of the *pergunna* above-named are in balance, the Court consider the measure pursued by you, as contained in the first paragraph of your letter, premature, and should not have been adopted without a previous report to the Court. With reference to the last part of your letter, the Court desire that if, when you receive these orders, the farmer has not tendered responsible security, you will attach the estate, and, after the prescribed manner, issue advertisements, inviting proposals for the farm for the unexpired period of the minority."

The Collector appears to have discovered, that the objection which he had made to *Bunmally Bose* as a surety, viz. that he was interested in the lease, was unfounded, and he, therefore, withdrew that objection, but he considered that he was not a sufficient security, and required some additional security to be provided. *Narayun Sing* did not provide such additional security, but he offered to deposit Rs. 10,000, until the security-bond should be executed by *Bunmally Bose*. This offer

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was rejected, and, in the month of *August* 1821, the Collector attached the estate, and entered into receipt of the rents. On the 15th of *August* 1821, he wrote to the Court of Wards, informing them of what he had done; and, on the 17th of *August*, the Court returned an answer, approving of what had been done, but directing that advertisements should be issued for the re-letting the property, according to the Regulations (which seem to have required an interval of twelve months), and directing that if, in the meantime, good security was offered, the farmer should be restored to possession.

In *September* 1821, *Narayun Sing* appears to have petitioned the *Zillah* Court for relief. The Court refused to interfere, a decision which was confirmed by the *Sudder*, on appeal, in *June* 1822. In the meantime the estate was let by the Collector for a large increased rent of Rs. 81,026. This arrangement was communicated by the Collector, to the Court of Wards, on the 18th of *February* 1822, and confirmed by the Court of Wards, on the 11th of *June* 1822.

Ram Nursing Bose having died, leaving the present Respondents, his representatives, a suit was instituted, in *July* 1826, by them, together with *Narayun Sing*, against the Appellant, to recover damages for the loss which they had sustained by being turned out of possession under the lease. *Narayun Sing* afterwards withdrew his claim, and the suit was continued by the Respondents.

After much litigation in the Courts below, and much difference of opinion amongst the Judges, on the 4th of *April* 1837, final judgment was pronounced for the Plaintiffs, awarding to them a sum of Rs. 38,531, together with interest upon part, from the time of their

expulsion; and, upon the whole, for the end of the term of ten years in the lease.

Against this judgment the present appeal is brought, and the ingenuity of Counsel has suggested a great many objections, some of which do not appear to us to be of much weight.

First. It is said that the Respondents were not parties to the contract with the *Rajas*, and, therefore, could not sue for any breach of it. The answer is obvious; that the suit is not founded on contract, but in a wrong alleged to have been done by the Appellant in depriving the Respondents of property, in which they had a valuable interest.

Secondly. It is said that *Ram Nursing Bose* could not have any interest in the lease, because he was a surety for the due performance of the obligations contained in it, by the lessee. A passage was cited from *Colebrooke's* Digest, to support this objection. It does not, however, appear to us to have any bearing on the case, and we have no doubt that *Ram Nursing Bose* has an interest for any injury to which he was entitled to compensation.

Thirdly. It was said that this was a mere mortgage transaction, which the mortgagors had a right to terminate by payment of the mortgage-money. This does not appear to us to be the exact nature of the transaction. *Narayun Sing* engaged to procure a loan, in consideration of having a beneficial lease for ten years. He did procure the loan, and his interest could not be defeated by paying off what was then due to the lenders.

Fourthly. It was next said, that the revenue was in arrear at the time when the lease was attached, and that there was power under the lease, in that case, to resume possession of the estate.

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If this had been the ground on which the attachment took place, it would have been necessary to examine very particularly into the evidence, in order to see whether anything had occurred which enabled the lessor to take advantage of a forfeiture. But, in fact, it is quite clear that no proceeding was ever taken upon any such ground, and that the lease was annulled because the lessee had failed to provide the security required by the Court of Wards on behalf of the Appellant.

The only substantial questions in the case are, First, Was that Court justified in annulling the lease upon this ground? Secondly, If not, have the damages done to the Respondents been assessed upon a reasonable principle?

It is clear, from the documents already referred to, that the security required was for the performance of the engagements contained in the original lease, and not merely for the payment of the revenue to the Government. If any doubt could exist upon the point, it would be removed by reference to the security-bond, proposed by the Collector for execution by *Bunmally Bose*.

Then, was there any right in the Court of Wards acting for the minor to require this security? The original lease, with a surety whom the lessors considered sufficient, had been granted by the ancestors of the minor. That surety was still alive, and no change is shown to have taken place in his circumstances. It would be singular if the circumstance of the estate devolving on a minor would enable the Court of Wards, on his behalf, to interfere with and alter the terms of a contract made by those through whom he claims. No authority of any kind has been produced to show the

existence of so extraordinary a power, and we must, therefore, assume that no such authority exists. If this be so, the dispossession was clearly wrongful, and the Respondents were, in our opinion, entitled to maintain their action.

But there remains a question hardly less important, upon which we find it quite impossible to concur in opinion with the Court below, viz. the principle upon which they have assessed the damages.

In the first place, they have given damages to the Respondents, as being entitled to a twelve-*anna* share, or twelve-sixteenths of the lease.

Now the only evidence in the case of *Ram Nursing Bose* having any interest at all, is found in the agreement of the 29th of *April* 1816, already referred to, by which *Ram Nursing Bose* would be entitled to a four-*anna* share, and the answer of the Appellant in this suit, according to which he would be entitled to a five-*anna* share.

A suit was referred to, by Mr. *Wigram*, as decided by the *Sudder* Court, and set forth in the papers, from which he argued that it was to be inferred that *Narayun Sing* and *Ram Nursing Bose* were partners in the lease. But, upon examining that suit, it does not even show that *Ram Nursing Bose* has any interest whatever in the lease. He is trustee merely as surety. How, then, is it possible to hold, as the Court below has done, that *Ram Nursing Bose* had a twelve-*anna* share?

Again, with respect to the computation of the loss, the Court appears to us to have adopted a very erroneous principle. They have held, that, under the original lease, the lessee had a clear profit-rent of Rs. 12,834, and holding the Respondents entitled to three-fourths of that sum, they consider them to have

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had a profit of Rs. 9,632 *per annum*, and they give them that sum for four years, amounting to above Rs. 38,500.

The profit-rent is thus made out: They treat the sum of Rs. 11,792, suspended in the original lease, as a profit-rent intended to be kept by the lessee; they then say that it appears that, in the *Bengal* year 1227, that is to say, in the last year of their holding, the lessee had increased the rents of two portions of the property by the sum of Rs. 2,097. To one half of this increase the lessees would be entitled; and, adding this sum, Rs. 1,048 to Rs. 11,792, the amount will correspond with the sum stated in the judgment.

The question, then, is, ought the sum of Rs. 11,792 to be treated as a profit-rent to the lessee, as a consideration for procuring a loan of Rs. 54,000 should have not only all the other advantages secured by the lease, but a gratuity of Rs. 11,792; for this would be the sum he would receive during the ten years term.

If anything so monstrous was intended, it should have been expressed in the most distinct terms. But so far is this from being the case, that the engagement of *Narayun Sing* is distinct to pay the annual rent, according to the Roll; and none of the Counsel on either side, at the hearing, could explain the item from which this extraordinary inference is drawn. The natural interpretation to be put upon it, as we think, is, that, from the gross sum appearing upon the Roll, a deduction of Rs. 11,792 was made in respect of sums which, for some reason or other, would not be received during the lease.

This construction is quite consistent with the agreement which preceded the lease, with the subsequent reduction of rent in consequence of the deficiency in the Roll, and with the whole conduct of the parties.

In a letter of the Collector of *Jessore*, of the 1st of *July* 1830, already referred to, this sum is spoken of as a sum suspended without any assigned cause. In the answer of the Court of Wards, it is suggested that this suspension could hardly have been made without some sufficient, or, at least, ostensible cause, and that they could not assume that the parties were fraudulently withholding so considerable a portion of the revenue.

We are satisfied, therefore, that this was not a sum in which the lessee was intended to take any interest. The profit which he was to derive from the lease was, however, considerable. First, he was allowed between two and three thousand rupees for the expenses of management. Secondly, he was to have five *per cent.* on balances. Thirdly, he was to have one half of any increased rent which might be derived from the property, through new arrangements which it was contemplated might be made with the *Ryots*, by a new settlement and re-measurement of the property. If he derived any profit beyond this, such profit would not have been according to his agreement, but in fraud of it, and we think it cannot be allowed.

We agree with the Court below in thinking, that the Respondents could not claim a share of the profits made by the new lease, because such profits were not made, and it does not appear that they could have been made, by the original lessees, nor have we any means of judging whether any, or, if any, what profits could have been made, or would have been made, by them.

In strictness, the proper order would be to vary the decision of the Court below, by declaring that the Respondents, instead of twelve-sixteenths, were entitled to five-sixteenths of the whole value of the lease

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at the time of eviction. That, in computing the value of such lease, no allowance ought to be made for the supposed profit-rent of Rs. 11,792, but that allowance ought to be made for one half of any increased rent which has been secured by the lessee before the eviction, and also for any excess of the sum allowed to the lessor for expenses of management, beyond the necessary expenses of Collector; and that regard ought also to be had to the chance of any increase of rent which the lessee might have fairly expected to receive.

It is obvious, however, that the Judges below could have little better means of fixing a fair amount of damages than we have; and we propose, after declaring the principle on which we proceed, to name a gross sum, by way of damages, and thus put an end to all further litigation. Taking the damages for the whole period of five years, we think a sum of Rs. 10,000 is proper to be allowed, as of the date of our judgment, till payment. We shall leave the costs below unaltered, and give no costs of appeal.

RAMLOLL THACKOORSEYDASS, and others - - - - - } *Appellants,*

AND

SOOJUMNULL DHONDMULL and MOOLTAN CHUND CUPPOORCHUND - } *Respondents.**

On Appeal from the Supreme Court of Judicature at Bombay.

22nd Feb. 1848.

THIS was an action on promises, brought by the Appellants in the Supreme Court of Judicature at *Bombay*, against the Respondents. The declaration or plaint contained seven counts. The first count was for breach by the Defendants, of a promise made on the 24th of *October* 1846, whereby, in consideration

By the common law of *England*, in force in *India*, an action may be maintained on a wager, although the parties had no previous interest in the subject-matter on which it is laid, if such wager be not against the interest or feelings of third persons, does not lead to indecent evidence, and is not contrary to public policy.

The mere circumstance that a wager concerns the public revenue, or creates a temptation to do a wrong, will not render it illegal.

A wager upon the average price which opium should fetch at the next Government sale at *Calcutta*, the Plaintiffs having to pay the Defendants the difference between such price and a sum named, per chest, and the Defendants having to pay the difference between such price and the sum so named, if the price should be above that sum; is not an illegal wager, or contrary to public policy, though the proceeds of the opium sold at *Calcutta* formed part of the Government revenue. The Judgment of the Court below, holding such wager illegal, reversed.

The Statute, 8 & 9 *Vict.*, c. 109, amending the law relating to games and wages, does not extend to *India*.

* Present: Members of the *Judicial Committee*,—Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

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that the Plaintiffs, at the request of the Defendants, then promised the Defendants to pay the Defendants within a reasonable time after notice of the first public Government sale of opium, to take place at *Calcutta*, next after the making of the said promise, such a sum of money as should be equal to five times the amount of the difference between the average price of one chest of *Patna* opium, of the opium to be sold at such first public Government sale, (to be calculated according to the actual price which the whole amount of *Patna* opium, which should be sold at such first public Government sale, should be sold for and realize,) and the sum of Rs. 1,395, if such average should be less than the sum of Rs. 1,395 per chest, the Defendants promised the Plaintiffs to pay the Plaintiffs, within a reasonable time after notice of such first public Government sale of opium at *Calcutta*, such sum as should be equal to five times the amount of the difference between the sum of Rs. 1,395, and the average price of one chest of *Patna* opium, of the opium to be sold at such first public Government sale, to be calculated as aforesaid, if such average should exceed the sum of Rs. 1,395 per chest.

The remaining six counts were for breaches by the Defendants, to the same effect, upon similar promises, made on other dates.

To each of these counts, the Defendants filed a demurrer for the following causes.

"That the Plaint is not sufficient in law, and the Defendants, according to the form of the Statute in such case made and provided, state and show to the Court here, the following causes of demurrer to each and every of the several counts of the said plaint, that is to say, that it does not appear in the several counts,

by whom the opium in the several promises in the Plaint mentioned was to be sold, or to whom the said opium belonged, or what certain quantity of opium was to be sold at the several sales, in the promises in the Plaint respectively mentioned, or within what certain period or time the said several sales were to take place, or what was the particular character or nature of the said several sales, and that it is not, in the several counts in the Plaint, stated with sufficient certainty, and does not appear therein how, or in what manner, or on the price of what certain opium the averages in the promises in the Plaint respectively mentioned, were to be calculated. The Defendants intend to argue, that the wagers declared on are illegal and void, because they have a tendency to interfere with a public sale, in which neither the Plaintiffs nor Defendants had any interest; because the wagers have a tendency to diminish the public revenue, by creating an interest in the Defendants, to exert themselves in reducing the price of opium, at the sales, in the Plaint mentioned; because the wagers bring into discussion the public revenue of *India*, at the instance of parties who are not shown to have any interest in the subject of the wagers, or any right to bring the revenue into discussion; because the wagers have a tendency to affect unduly, public markets and prices; and because the wagers are against public policy; also that the promises in the plaint mentioned, were void by reason of the infancy of one of the Plaintiffs, and that the Supreme Court is precluded from entertaining questions of revenue."

The Plaintiffs having joined in demurrer, the same was argued on the 22nd, 23rd and 24th of *February*

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1847, before Sir *D. Pollock*, Chief Justice, and Sir *E. Perry*, Puisne Judge.

The learned Judges differed in opinion; Sir *E. Perry* being of opinion, that the Appellants were entitled to recover; the wager declared upon, being legal. Sir *David Pollock* was of a contrary opinion, as such contract tended to interfere with the price of opium in the market, and was, therefore, contrary to public policy, and he gave judgment for the Defendants, on the demurrer, ordering each party to pay their own costs.

From this decision the Plaintiffs in the Court below appealed to Her Majesty in Council. The appeal now came on for hearing.

Sir *F. Kelly*, and Mr. *Peacock*, for the Appellant.

The simple point in this case, is, whether, according to the principles of the common law of *England*, prevailing and in force in *India*, the contract made between the parties is a legal and binding contract.—[Lord *Campbell*: Is not this, in form and substance, a wager on the price of opium? It cannot be said to be a mercantile transaction.]—We admit that, upon the record, it must be taken as a wager contract: and the question then is, whether, as a wager, it is a good contract in law. It is admitted that the late Gambling Act, 8 & 9 *Vict.*, c. 109, does not extend to *India*. A wager is not, *per se*, illegal, at common law, and it lies on the Defendants, who resist its enforcement, to show that this is not good. The exceptions are, where the wager is prohibited by Act of Parliament, or has a tendency to injure the feelings of private individuals, not parties to the contract; or if the contract be against

morality, decency, or tending to a breach of the peace. *Jones* v. *Randall* (*a*); *Da Costa* v. *Jones* (*b*); *Good* v. *Elliott* (*c*); and *Allen* v. *Hearn* (*d*). Unless, therefore, the wager in this case, falls within one or other of these objections, it is valid. It can only be argued against this wager, that it holds out a temptation, to the parties interested, to commit a fraud, in depreciating or enhancing the prices of opium in the market.—[Lord *Campbell*: We are not to presume that a fraud will be perpetrated; it is not necessary for the legality of a wager, that there should be no temptation to commit a wrong.]—In the *Earl of March* v. *Pigot* (*e*), it was held, that the circumstance of there being an inducement to kill, or shorten a life, would not make the wager bad. So again, in *Gilbert* v. *Sykes* (*f*), the wager, on the life of *Napoleon Bonaparte*, was held bad, not on the ground that it was an inducement to procure the assassination of the Emperor, but that it was against public policy, that foreign Sovereigns should be able to complain, that a subject of this country had laid a wager favouring their assassination. It is well settled that time-bargains in the English funds were good, by the common law, prior to the Statute, 7 *Geo.* II., c. 8; that being so, why should not this wager, which is a time-bargain, be good? It may have been, at one time, a question whether that Statute extended to foreign funds. In *Morgan* v. *Pebrer* (*g*), it was held, that a wager on the price of foreign funds was legal. That case is in accordance with *Wells* v. *Porter* (*h*), and *Oakly* v. *Rigby* (*i*); the law

(*a*) Cowp. 37.
(*b*) Cowp. 729.
(*c*) 3 Term Rep., 693.
(*d*) 1 Term Rep, 56.
(*e*) 5 Burr. 2803.
(*f*) 16 East, 150.
(*g*) 4 Scott, 230.
(*h*) 2 Bing. N. C. 722.
(*i*) 2 Bing. N. C. 732.

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is, therefore, settled that wagers, as to the price of foreign funds, are legal. In *Evans* v. *Jones* (*a*), a wager, as to the acquittal or discharge of a prisoner, on trial on a criminal charge, was declared illegal, on the ground that, according to the ordinary course of things, the wager gave an interest to one of the parties, to do what would be against his duty. The principle laid down in that case was this, that a man should not be allowed by a wager to acquire an interest in doing what was contrary to his evident duty. *Atherford* v. *Beard* (*b*), which was a wager respecting the amount of hop duties to be collected, was decided on the ground that individuals having nothing to do with the affairs of Government, as the collection of the revenue, should not make wagers upon the amount of revenue in a particular department, because it would lead to an improper discussion, and was contrary to sound policy. It is no objection to a wager that it may have some connection with the revenue. It is only bad where the wager cannot be determined without doing that which is against public policy. This was expressly decided, by Lord *Ellenborough*, in *Mortimer* v. *Salkeld* (*c*). It was urged by the Defendants below that the wager in this case was illegal, because the parties to the wager had no interest in the subject-matter of the wager. This position is distinctly displaced by the decisions (*d*) prior to the 19 *Geo.* II., c. 37, which decided that a party might insure a ship in which he had no interest. *Craufurd* v. *Hunter* (*e*). *Goss* v. *Withers* (*f*). A contract for sale is not bad, merely because the party who is to

(*a*) 5 Mee. & Wel. 77. (*b*) 2 Term Rep., 610.
(*c*) 4 Camp. 42.
(*d*) See Cases collected in 1 Marshall on Insurance, p. 119.
(*e*) 8 Term Rep., 23. (*f*) 2 Burr. 683.

deliver the goods at a future day is not possessed of the goods, and has no reasonable expectation of being possessed by the day named. *Hibblewhite* v. *M'Morine* (*a*). From these cases, the following conclusions are to be drawn: That a wager is only bad at common law, where, by the terms of the wager, the object is illegal or immoral, or where it can only be determined upon the result of inquiries which it is against public policy to allow, or where the wager itself places the parties in a position where their interests are immediately in opposition to their duties. In the present case there was no natural tendency arising from the wager, either to raise or depress the prices of the Government sales of opium, and it can only be argued as to its invalidity by reason of there being a natural tendency one way or the other. We submit, therefore, first, that the several promises declared on are legal, and do not interfere with or influence public sales, or prejudicially affect the public revenue of *India*: secondly, that the promises declared on are in no respect contrary to public policy, or have a tendency for either party to violate public morality. — [Lord *Campbell*: Both the parties to the record are Hindoos, and, as such, under the Charter of Justice, the contract may be governed by the Hindoo law; do you raise any question on that point?]—None. The contract has been treated in the Court in *India*, as one of English law.

Mr. Serjeant *Channell*, and Mr. *Smirke*, for the Respondents.

The cause of action is founded on a mere wager, and not upon any *bonâ fide* contract for the sale of opium,

(*a*) 5 Mee. & Wel. 462.

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the parties to the wager having no interest in the subject-matter of the wager. The event of the wager was subject to be determined or influenced by the acts of the Plaintiffs, viz., by bidding an excessive price at the opium sales. We admit that the Statute, 8 & 9 *Vict.*, c. 109, does not apply to *India*, neither do we deny that a wager may be good by the common law, but the *onus* is not thrown upon us to bring this wager within any particular class. It is enough for us to show that this wager has a tendency to work injuriously to individuals, and that it is not necessary to assume that the party will so act as to cause a wrong. This wager clearly affected, or had a tendency to affect, the sale of a Government commodity: it concerned a branch of the public revenue of the East India Company (*Bengal* Reg. XIII. of 1816), received and applied by the Company in trust for the Crown, for the Government of *India*. It was admitted in the argument below, on both sides, that the Court was bound to take notice that the wager concerned the public revenue. Such a wager is, therefore, illegal and void, on the ground of public policy, and especially on the ground that it gives one of the parties to it an immediate interest in diminishing the revenue arising from Government opium sales. The Government must be desirous that every sale should be conducted so as to be fair to the public, fair to the trade, and fair to itself. The case of *Bryan* v. *Lewis* (*a*), shows that to make time-bargains invalid, it was not necessary that the articles bought and sold should in any way belong to the Government.—[Lord *Campbell*: Where there is a contract for goods to be delivered on a given day, at a given price, that is not what is properly called a time-

(*a*) Ryan & Moody 386.

bargain. What is generally understood as such, is where there is a fictitious sale of goods, at a particular price, and an agreement to pay or receive the difference between that price, and the price at which the goods shall be, on a particular day.]—It was the evident interest of one of the parties to this contract to depress, and of the other to raise, the price of opium: we submit that it is against public policy that public auctions should be tampered with. The case of *Mortimer* v. *Salkeld*, relied on by the other side, has no bearing on the present question: it merely decided that dealings in lottery produces were not within the stock-jobbing Acts. Neither is the case of *The Earl of March* v. *Pigot*, considered as an authority. *Eltham* v. *Kingsman* (*a*). *The King* v. *De Berenger* (*b*). Upon the whole, we submit that no wager relating to a subject-matter of State is legal. Neither is a wager, with respect to the subject-matter of which the parties have no interest, and that no action can be maintained on such wager. *Murrey* v. *Kelly* (*c*). *Thornton* v. *Thackray* (*d*). *Hartley* v. *Rice* (*e*). *Squires* v. *Whisken* (*f*). *Shirley* v. *Sankey* (*g*). *Evans* v. *Jones* (*h*). *Brown* v. *Lisson* (*i*). *Henkin* v. *Guerss* (*k*). *Fisher* v. *Waltham* (*l*). *Pope* v. *St. Leger* (*m*). *Levi* v. *Levi* (*n*).

Mr. *Peacock*, in reply.

It cannot be maintained, that the mere circumstance

(*a*) 1 B. & Ald. 683. (*b*) 3 Mau. & Sel. 67.
(*c*) Cited Selwyn N. P. 1411 (11 Edit.).
(*d*) 2 Y. & J. 156. (*e*) 10 East, 22.
(*f*) 3 Camp. 140. (*g*) 2 Bos. & P. 130.
(*h*) 5 Mee. & Wel. 77. (*i*) 2 H. Bla. 43.
(*k*) 12 East, 247. (*l*) 4 Q. B. Rep. 889.
(*m*) Lutwyche, 484. (*n*) 6 Car. & P. 239.

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of a wager having a tendency to make a party act immorally, will vitiate the wager; if it were so, prior to the Statute, 19 *Geo.* II., c. 37, all policies on ships, in which the insured has not an interest, would have been bad, as tending to procure the loss of the ship. So in the case of horse-racing, the legality or illegality of the wager depends, not on whether the tendency was an injurious one, but only on the circumstance whether the wager be for a sum of money less than ten pounds.

Lord CAMPBELL:

28th Feb.

This was an appeal from a judgment of the Supreme Court of Judicature, at *Bombay*, holding, on a demurrer to a declaration, that the contract therein set out was illegal, and could not be enforced in a court of justice. The contract amounts to a wager upon the average price which opium should fetch at the next Government sale at *Calcutta*, the Plaintiffs having to pay the Defendants the difference between this price, and a sum named, per chest, if this price should be below that sum; and the Defendants having to pay the Plaintiffs the difference between this price and that sum, if this price should be above the sum.

We are of opinion that we must take judicial notice, that the opium to be sold was the property of the Government of *India*, and that the produce was to form part of the public revenue.

I regret to say that we are bound to consider the common law of *England* to be, that an action may be maintained on a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feelings of third persons, and does not lead to indecent evidence, and is

not contrary to public policy. I look with concern and almost with shame, on the subterfuges, and contrivances, and evasions, to which Judges in *England* long resorted, in struggling against this rule, and I rejoice that it is at last constitutionally abrogated by the Legislature, an event which probably would have happened much sooner without the abortive attempts to accomplish the object by judicial decision.

The Statute, 8 & 9 *Vict.*, c. 109, does not extend to *India*, and although both parties on the record are Hindoos, no peculiar Hindoo law is alleged to exist upon the subject: therefore this case must be decided by the common law of *England*.

On the part of the Defendants, the general rule, as I have stated it, is admitted; but they contend that this wager is illegal, on the ground of public policy as it concerns the public revenue, and it gives the Defendants an interest unduly to lower the price, whereby individuals dealing in opium, and the East India Company, may be injured.

We are of opinion that the mere circumstance that this wager refers to the public revenue does not establish its illegality. The cases about the hop duties, *Atherfold* v. *Beard*, (2 Term Rep. 610,) and *Shirley* v. *Sankey*, (2 Bos. & Pul. 130,) proceed on the ground, that the wagers could not be determined without calling as witnesses, officers of the Government, and making them disclose what had been the amount of a tax within a particular district. A wager on the amount received for a tax, as it shall appear, in a return published by the authority of the House of Commons, I think would have been free from legal objection.

But the great question here is, whether the wager

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gave either party an interest, which is to be considered injurious to individuals or to the Government. We are of opinion, that, although, to a certain degree, it might create a temptation to do what was wrong, we are not to presume that the parties would commit a crime; and as it did not interfere with the performance of any duty, and as if the parties were not induced by it to commit a crime, neither the interests of individuals or of the Government could be affected by it, we cannot say that it is contrary to public policy.

Suppose the wager had been laid in *England* within a month before the sale was to take place at *Calcutta*, I see no valid objection to its legality; for it could not by possibility have affected the result of the sale; and I can see no difference, in point of law, from the fact, that they were residing at *Calcutta*, where the wager was laid and the sale took place.

The Defendants' Counsel mainly relied upon the case of *Evans* v. *Jones* (5 Mee. & Wel. 77), in which it was held, that a wager upon the result of a criminal trial was illegal: but this proceeded upon the ground, that it gave the parties an interest, at variance with duties they might have to perform as witnesses, or prejudice in the same manner as a wager, upon the event of a law-suit, would be illegal with the Judge who had to decide it, or a wager on the result of a parliamentary election with one of the electors.

Had the case of *Gilbert* v. *Sykes* (16 East, 150), respecting the life of *Napoleon*, been decided on demurrer, or in arrest of judgment, it would have been an authority of great weight in support of the doctrine, that a wager that has any tendency to tempt a man to offend against the law is illegal. But we must recollect that it was discussed on a motion for a new trial,

after a verdict for the Defendant against evidence, and that the Court was mainly influenced in refusing a new trial, by the consideration, that, according to the evidence, the wager arose out of a conversation respecting the probability of *Napoleon* being assassinated, so that it was considered tantamount to a wager, that he would be assassinated within one hundred days. It is likewise remarkable, that Mr. Justice *Grose*, who, when he differed with the rest of the Court, was generally thought by the profession to be right, was of opinion that this wager, under all the circumstances, was lawful, although he concurred in refusing the new trial.

The doctrine contended for, is disproved by the consideration that time-bargains in English funds were not unlawful till the Stock-jobbing Acts, although such bargains gave an interest to raise or to depress the funds, injuriously to individuals and to the State: by the consideration that before the 19th *Geo.* II., an insurance on a British ship was lawful, although the party assured had no interest in the ship, and had a temptation to contrive her destruction before she reached her destination; and by the consideration, that before the Statute, 14 *Geo.* III., insurances on lives were lawful, without any interest in the life insured, although as soon as the policy was executed, the party who had paid the premium had a temptation to commit murder.

The danger of such speculations is illustrated by Lord *Tenterden's* ruling, that a contract for the sale of goods, the seller not having any such goods at the time of sale, was void; whereas it must now be considered as settled, that not only such a mercantile contract is valid, but that there was no illegality at common law in a time-bargain for goods at home, any more than in

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a time-bargain for foreign securities. *Hibblewhite* v. *M'Morine* (5 Mee. & Wel. 462).

We were referred to the case of *The King* v. *De Berenger*, (3 Mau. & Sel. 67,) to show the frauds which may be attempted, from the desire of gain in such speculations; but the Defendants' Counsel might as well cite the murders supposed to have been committed a few years ago, which have been made the subject of a popular novel, to show that insurance on lives ought to be entirely prohibited. If the doctrine contended for were established, it ought to be followed up with an enactment, that the life of the Queen (whom God long preserve) should never be introduced into a lease, because by its introduction Her sacred person is endangered. But the law believes that the awful penalties which it provides, to enforce the dictates of conscience and religion, will outweigh the temptation to commit spontaneous crimes, for the sake of gain, where no conflict is introduced with a positive duty.

It is for the legislative Council at *Calcutta* to consider how far it may be conducive to the benefit of our Indian empire, to introduce into it the provisions of the Statute, 8 & 9 *Vict.*, c. 109.

We think that, by the common law of *England*, the wager in question is not illegal, and may be enforced in a court of justice; and agreeing with Mr. Justice *Perry*, we shall report to Her Majesty that, in our opinion, the judgment appealed against, ought to be reversed.

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

RICHARD SPOONER and BOMANJEE NOWROJEE - - - } *Appellants,*

AND

JUDDOW (Widow) - - - - *Respondent.**

On Appeal from the Supreme Court at Bombay.

19th Feb. 1848, & 14th Feb. 1850.

THIS was an action of trespass brought in the Supreme Court at *Bombay*, in which *Hurkissondass Hurgovundass*, since deceased, and now represented by his widow, *Juddow*, the Respondent, was Plaintiff, and the Appellants were Defendants.

By the Charter of Justice of the 23rd of *December*, 1823, establishing the Supreme Court at *Bombay*, that Court was prohibited (in like manner as the Supreme Court at *Calcutta*, under the 21st *Geo.* III., c. 70, s. 8) from entertaining any jurisdiction in any matter concerning the revenue, under the management of the Governor and Council, or any act done in the collection thereof.

In an action of trespass brought against the Collector of revenue at *Bom-*

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillor,—*Assessor*,—Sir E. Ryan.

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The action was brought under the following circumstances :—In the month of *November*, 1846, *Hurkissondass Hurgovundass* was the owner and occupier of a house and piece of ground, situated in *Bazar Gate-Street*, within the town of *Bombay*, which were liable to the payment of an annual quit-rent, called pension, which forms part of the land revenue of the East India Company, and there was then due to the Collector the sum of Rs. 8. 3a. 8p., on account of arrears of such pension, which had not been collected from the above-mentioned premises since the year 1827. At that period *Narrondass Tookaydass* was the owner and occupier of the premises, and his name was registered as such in the books of the Collectorate; subsequently, in the year 1836, this property was sold to

bay, for distraining for arrears of Government "quit-rent," the Defendant pleaded "Not guilty" only. The Supreme Court at *Bombay* held, that the "quit-rent" was not "revenue" within the meaning of the Charter, and that the act complained of, was not warranted by the usage of the country and the Company's Regulations, and that the Court had jurisdiction to entertain the action; and found for the Plaintiffs.

Held, reversing such finding and judgment,—

First, that the "quit-rent" was part of the "revenue" of the East India Company at *Bombay*; and

Secondly, that it being a matter concerning the revenue, and the collection thereof, the Supreme Court had no jurisdiction, and that the Court being excluded by the Charter from any matter concerning the revenue, the plea of "Not guilty" was sufficient, and that the Judge ought, at the trial, to have directed a non-suit, or a verdict to be entered for the Defendants.

A plea in abatement to the jurisdiction of the Court must point out another Court before which the matter is cognizable. A plea in bar, if well founded, is sufficient, without pointing out the Court in which the suit ought to have been brought.

If a party *bonâ fide*, and not absurdly, believes that he is acting in pursuance of a Statute, he is entitled to the special protection which the Legislature intended for him, although he has done an illegal act.

The Supreme Court, in overruling the objections to the jurisdiction of the Court, refused leave to appeal; the subject-matter of the action being trifling, and under the amount required by the rules of the Privy Council. Upon Petition, the Judicial Committee granted leave to appeal, but upon terms, of the East India Company paying the Respondent's costs of the appeal, to enable him to appear, to prevent the question being argued *ex parte*.

Hurkissondass Hurgovundass, who continued in possession of it up to the date of the proceedings which gave rise to the present appeal. No change, however, of name was made in the books of the Collectorate, and throughout this period, *Narrondass Tookaydass* appeared in those books, as the registered proprietor of the property.

The Appellant, *Spooner*, was the Collector of revenue at *Bombay*, and the other Appellant, *Bomanjee Nowrojee*, was one of his assistants. On the 11th of *October*, 1846, *Spooner* sent a *purvoe*, or officer belonging to the Collectorate establishment, to the house of *Hurkissondass Hurgovundass*, in order to demand the payment of the arrears of pension which were due from him as occupant of the above premises. *Hurgovundass* refused to pay the arrears, and in consequence of this refusal, *Spooner*, on the 6th of *November*, 1846, placed a warrant, signed by him, in the hands of *Bajeeba Jugunnathjee*, one of the receivers in the office of the Collector, in order that it might be executed. The warrant was in the following form:—"To *Babajee Jugunnathjee*.—Whereas *Narrondass Tookaydass* has failed, after due notice, to discharge the revenue due by him to the Honourable Company, amounting to eight rupees, three annas, and eight pice (8. 3. 8.), you are hereby authorized, by virtue of the powers given to me under the 4th Sec., Cl. First, of Reg. XIX., A.D. 1827, to enter into and take possession of the house and property of the said *Narrondass Tookaydass*, situated at *Bazar Gate-Street*, within the fort, and to continue in such possession thereof, until the said sum of Rs. 8. 3a. 8p. shall be duly paid, or until the said house and property shall have been sold, in liquidation

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of the amount so due, pursuant to the said Regulation."

Babajee Jugunnathjee, on the 24th of *November*, in the same year, went, accompanied by the Appellant, *Bomanjee Nowrojee*, and some sepoys, to the house of *Hurkissondass Hurgovundass*. They were, however, not allowed to enter, and on a demand of payment being made, *Cowasjee Hormasjee*, his agent, said that he would not pay the amount, nor allow them to take anything away with them. He then became very violent, and ordered some of his attendants to expel the officers of the Collector; a scuffle ensued, in the course of which one of the sepoys took down a globe lamp, and the Appellant, *Bomanjee Nowrojee*, ordered him to carry it away. This was done, and the police having come up, *Cowasjee Hormasjee* was given into custody, on the charge of assaulting the Collector's servants in executing the warrant of distress. On the 27th of *November*, the case was brought on before Mr. *Larken*, one of the magistrates of *Bombay*, who decided that the warrant was illegal, and dismissed the case.

On the 13th of *January*, 1847, the Respondent brought an action of trespass in the Supreme Court of *Bombay*, against the Appellants, and in his declaration stated, that they, on the 24th of *November*, 1846, with force and arms broke and entered his dwelling-house, and made a great noise and disturbance therein, and forced and broke open, broke to pieces and damaged, a door of the Respondent, belonging to the dwelling-house, and seized and took away a door and a globe lamp of the Respondent, then being in the said dwelling-house, of the value of Co.'s Rs. 50, and

forcibly carried off the same, and converted and disposed thereof to their own use, to the damage of the Respondent of 10,000 rupees. To this the Appellants pleaded "Not guilty," and thereupon issue was joined.

On the 9th of *June*, 1847, the cause came on for trial before Sir *Thomas Erskine Perry*, acting as Chief Justice; and the Counsel for the Appellants objected, that the Court had no jurisdiction to try the case, on the ground, that it was a matter concerning the revenue, and expressly excepted out of the jurisdiction of the Supreme Court, by the Statutes of the 37th *Geo.* III., c. 142, and the 21st *Geo.* III., c. 70, sec. 8, and the 4th *Geo.* IV., c. 71; and by the Letters Patent which established the Court. To prove the nature of the claim, Mr. *Hutchinson*, an assistant Collector of land revenue, was called, who stated that arrears of revenue called pension, amounting to between 8 and 9 rupees, were due from the property in question, and that it was the practice to issue the warrant in the names of the parties, whose names were entered in the books of the Collectorate. He also stated, that the name of *Hurkissondass Hurgovundass* had not been entered in those books in place of the name of *Narrondass Tookaydass*, and that the distress warrant was for the pension, due from the land in the occupation of *Hurkissondass Hurgovundass*. The learned Judge reserved the point, and gave interlocutory judgment in the nature of a verdict for the Plaintiff, assessing the damages at 250 rupees.

On the 12th of *June*, 1847, the Counsel for the Appellants moved on the leave reserved, and obtained a rule *nisi*, to show cause, why a verdict should not be entered for the Defendants, on the ground, that the

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Supreme Court had no jurisdiction to entertain the action; and cause having been shown against this rule, Sir *T. E. Perry*, on the 22nd day of *June*, 1847, discharged it with costs. In delivering judgment, the learned Judge said that, at the trial of the cause, he thought the question to be left to the jury was, "whether the irregularity which had been confessedly committed by the Defendants in the execution of the warrant, was a mere slip, such as might happen to the most careful revenue officer in the exercise of his duties, or whether it was a substantial breach of the law, which entitled the Plaintiff to due compensation." The learned Judge then proceeded thus:—"I have not the least doubt that the Legislature never intended to give the Company's servants in *India*, a total immunity from action in the Supreme Court for wrongs committed in the collection of the revenue, any more than the 21st *Geo.* III. intended to give them an immunity for wrongs committed as magistrates. On perusing the whole of these Statutes, it appears to me clear, that the intention of the Legislature was, to erect a separate Court for the decision of the revenue claims, and to allow the Company's officers to collect the revenue, either in the mode in which they had been accustomed to do so heretofore, or according to the regulations to be laid down, from time to time, by the local Government. Ample powers are thus given for all governmental purposes, but it is so contrary to the spirit of British Legislation to suppose, that unlimited or irresponsible powers were intended, as to make me require express words to show that such was the intention.

"It was said, however, that the subject would not be without remedy, in any case of wrong, as the Regu-

lation of 1827 establishes the Court of a Revenue Judge for the Island of *Bombay*, to which a complaint like the present might be made. But that Regulation did not receive legislative force till the year 1834, when it was confirmed by the Supreme Government; and even if it were in force from its commencement, still from 1797 till 1827, there was no tribunal, except the Supreme Court, open for the redress of such a grievance; and so, at the present moment, where is a party in the *Mofussil* to sue for any illegal act committed in the collection of the revenue? All cases in this Presidency are, I believe, tried, in the first instance, before a native Judge, but the idea of a Collector being tried before a *Sudder Amin*, for trespass, presents such a ludicrous aspect, that it never could be seriously entertained by any one acquainted with *India*.

"For all these reasons, I think that the jurisdiction of this Court has not been taken away, when the act complained of is not warranted by the usage of the country, or by the Company's Regulations; and as I do not see the slightest trace for any authority to demand the arrears of twenty years, or of two hundred years, as claimed by the Collector, of any person found in occupation of the land, I think the act in question was not authorized by usage and practice; neither does the Regulation of 1827 furnish any authority for the act. It was argued, for the Plaintiff, that the mode there pointed out for executing a distress had not been followed: but this is a mistake; the warrant there spoken of does not refer to a distress for land revenue, but to other matters comprised in a different chapter."

On the 27th of *August*, 1847, final judgment was

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signed in the cause; and, on the same day, the Appellants presented a petition to the Court, praying that they might have leave to appeal to Her Majesty in Council, against the judgment. On the 30th of that month, Counsel for the Appellants were heard in support of the petition; and, on the same day, Sir *T. E. Perry* made an order, that the motion should be refused, on the ground, that the value of the matter in dispute was under the sum of 10,000 rupees, the amount provided by the rules of the Privy Council. The Appellants, thereupon, presented a petition to Her Majesty in Council, for leave to appeal from the judgment and order.

Mr. *Wigram*, Q.C., in support of the petition.

19th Feb. 1848.*

The present application is for leave to appeal. The sum involved is trivial, and greatly under the sum required by the Charter of Justice of *Bombay*, and the rules of the Privy Council; but the question of jurisdiction of the Supreme Court, in matters relating to the revenue, is one of very great importance, as affecting the revenue authorities in *India*.

Lord LANGDALE:

The question appears to be of very considerable importance; but you observe that the amount at issue is only a sum of 250 rupees, and for the purpose of deciding that, you put the Respondent to the expense of this appeal. The question is, whether this prosecution being by the East India Company, and no doubt important to have decided, for the benefit of

* Present: Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

the whole country, the whole expense of this appeal should not be borne by them. However important it may be to establish the law, upon a question of this kind, it would be very wrong to put the party to so great expense in a case where so small amount is at issue. Even if the right of appeal were granted, you might be defeated in this way; the Respondent may say, that it would be much better to pay his 250 rupees, than to come here, and pay the expense of this prosecution.

By an Qrder in Council, bearing date the 2nd of *March*, 1848, it was ordered, by Her Majesty in Council, that the Appellants should have leave to appeal from the judgment and order, the East India Company undertaking to bring the appeal to a hearing before the Judicial Committee of the Privy Council, and to pay all costs, charges, and expenses, which might be incurred on behalf of the Respondent, as well as on behalf of the Appellants.

Ilurkissondass Hurgovundass died shortly afterwards, without issue, but leaving a widow, named *Juddow*, who, by an order of the Supreme Court of *Bombay*, dated the 15th of *January*, 1849, was admitted to be the Respondent to this appeal.

The appeal now came on for hearing.

Mr. *Wigram*, Q. C., Mr. *Lloyd*, Q. C., and Mr. *Forsyth*, for the Appellants.

Two questions arise. First, whether the Supreme Court at *Bombay*, is not precluded from entertaining and adjudicating upon such a case as this, which relates to the revenue of the *Bombay* Government; and, Secondly, whether the objection to the jurisdic-

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tion of the Supreme Court is properly raised, under the plea of "Not guilty."

I. The Supreme Court has no jurisdiction to try the case. It relates to a matter concerning the revenue of *India*, and is exempt from the jurisdiction of that Court. The Court of Judicature at *Bombay* was first created by the Statute, 37 *Geo.* III., c. 142, s. 9, which section empowered the Crown, by Charter or Letters Patent, under the Great Seal, to erect and establish a Court of Judicature at *Bombay*, and appoint a Recorder thereof; and the 11th section expressly provided, that such Court, so to be erected, should not "have or exercise any jurisdiction in any matter concerning the revenue under the management of the Governor and Council respectively, either within or beyond the limits of the town, fort, or factory, or concerning any act done according to the usage and practice of the country, and the Regulations of the Governor and Council." In conformity with the provisions of this Act, the Court of the Recorder of *Bombay* was established by Letters Patent, which, in the words of the Statute, was expressly excluded from exercising any jurisdiction in any matter concerning the revenue.

In the year 1823, an Act of Parliament was passed, the 4th *Geo.* IV., c. 71, the seventh section of which provided, that it should be lawful for His Majesty, *George* the Fourth, by Charter or Letters Patent, to establish a Supreme Court of Judicature at *Bombay*, which Court was to have the same Civil, Criminal, and Admiralty and Ecclesiastical Jurisdiction, and to be subject to the same limitations, restrictions, and control, as the Supreme Court of Judicature at *Fort William* in *Bengal* consisted of, or was invested with.

By the ninth section, so much of the Charter and the Statute, 37 *Geo.* III., c. 142, as related to the Court of the Recorder of *Bombay*, was repealed. Now the Supreme Court of Judicature at *Fort William*, to which reference is made in this Statute, was established by Letters Patent of the 26th of *March*, 1774, under the Statute 21 *Geo.* III., c. 70. By section 8 of that Statute, it was enacted, "that the said Supreme Court should not have or exercise any jurisdiction in any matter concerning the revenue or concerning any act or acts ordered or done in the collection thereof, according to the usage and practice of the country, or the regulations of the Governor-General and Council." The Supreme Court at *Bombay* was established by Letters Patent of the 8th of *December*, 1823, which contained this clause, "Nor shall the said Court have or exercise any jurisdiction in any matter concerning the revenue under the management of the said Governor and Council of *Bombay* respectively, either within or beyond the limits of the said town, or the forts or factories subordinate thereto, or concerning any act done according to the usage and practice of the country, or the regulations of the Governor and Council of *Bombay* aforesaid." We submit, therefore, that it is conclusive, from the provisions of these Acts of Parliament and Letters Patent, establishing the Supreme Court at *Bombay*, that that Court has no jurisdiction whatever, in any manner connected with the collection of the revenue, of which the quit-rent, or pension, in question, forms part; and this construction can work no injustice; for, if parties feel themselves aggrieved by any act done by or under the authority of the Collector, they are not without a remedy; for by Regulation XIX. of 1827, it is pro-

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vided, that the senior Magistrate of Police in the Island of *Bombay* shall be Revenue Judge at that Presidency, and the Collector and his assistants and native officers shall, in respect of acts done by them in their official capacities, be amenable by civil prosecution to the jurisdiction of the Revenue Judge, in whom alone is vested the jurisdiction to decide all suits on account of the land revenue. If, therefore, the Charter was silent on the subject, this Regulation, which has the force of law, would clearly exclude the jurisdiction of the Supreme Court.

Now it cannot be doubted but that this pension, or quit-rent, is to be considered as part of the general revenue of the State of *India*, and within the exception pointed out by the Statute. The Court below has erred in treating it as distinct from land revenue. The Statute, 21 *Geo.* III., c. 70, s. 8, uses the term "revenue," and not "land revenue."

It is, however, said that there were irregularities committed by the officers, and that the warrant was objectionable. But if an act is done *bonâ fide*, even though there be an excess of jurisdiction in the Magistrate, or, as it is alleged in this case, an irregularity on the part of the officer collecting the revenue, both the magistrate and officer are protected by Acts of Parliament. *Prestidge* v. *Woodman* (*a*), *Weller* v. *Toke* (*b*), *Daniel* v. *Wilson* (*c*), *Hughes* v. *Buckland* (*d*), *Huggins* v. *Waydey* (*e*), *Parton* v. *Williams* (*f*), *Smith* v. *Wiltshire* (*g*).—[Dr. *Lushington*: Suppose a man was killed by the revenue officers, who would try the case?

(*a*) 1 Bar. & Cr. 12.
(*b*) 9 East. 364.
(*c*) 5 Term. Rep. 1.
(*d*) 15 Mee. & Wels. 346.
(*e*) 15 Mee. & Wels. 357.
(*f*) 3 Barn. & Ald. 330.
(*g*) 2 Brod. & Bing. 619.

It is a different thing to protect an officer who might justify having committed such an act.]—The *Bombay* Regulation III. of 1799 gives redress for all complaints against revenue officers, and the Regulation IV. of 1815, s. 5, makes further provisions to the same effect. In case of murder, the Supreme Court would have jurisdiction to try the case.—[Lord *Campbell*: Would the Revenue Judge have power to award damages for trespass?]—Yes. Regulation XIX. of 1827 enacts, that the Collector, for the purpose of collecting the land revenue, and his assistants, and native officers, shall, with respect to acts done by them in their official capacities, be amenable by civil prosecution to the jurisdiction of the Revenue Judge. The same distinction exists in this country. An action of trespass against a revenue officer for his conduct in the execution of his office would be removed from the Common Pleas, or Queen's Bench, to the Court of Exchequer. *Anon* (*a*), *Cawthorne* v. *Campbell* (*b*), *Attorney-General* v. *Hallett* (*c*), *Siddon* v. *East* (*d*), *Attorney-General* v. *Kingston* (*e*). The Indian authorities are to the same effect; thus in *Woodupnarain Bhooyeah* v. *Harvey* (*f*) the Supreme Court at *Calcutta* held, that a bill of discovery in aid of proceedings in a *Mofussil* Court would not lie against a Collector of revenue, regarding a claim made by him in the execution of his office. It is true Sir *E. H. East*, in the case, *Budden Soorye* v. *D'Oyley* (*g*), sustained an action of

(*a*) 1 Anst. 205.
(*b*) Note, 1 Anst. 205.
(*c*) 15 Mee. & Wels. 97.
(*d*) 1 Cr. & Jer. 12.
(*e*) 8 Mee. & Wels. 163.
(*f*) 1 Bignell's Calc. Reps. 77.
(*g*) East's Notes of Cases, 2 Morley's Digest, 172.

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trover against a Collector of revenue, but the report of the case is doubtful.

II. The next point really is only a question of pleading, purely of a technical character; it is whether it was open to us at the trial to take the objection to the jurisdiction of the Court, under the plea of "Not guilty?" The Court had no jurisdiction to try the case, and as soon as it had judicial notice of that fact, as by the Advocate-General objecting at the trial that the cause of action was *ultra vires*, it was the duty of the Judge to have stayed the proceedings. The Court could either have discharged the jury, or have refused to enter up judgment upon the verdict. In *Egerton* v. *Furseman* (*a*), the action was brought against a stakeholder, on a dog fight, to try which dog had won the battle. The action was brought before Chief Justice *Abbott* with perfectly regular pleas, both parties being anxious to have the case tried by a jury; but he said, "I certainly shall not try the case," and refused to hear it, as the time of the Court would be wasted in trying such a case; and there are cases in which Judges in a similar way have refused to let such frivolous cases go to a jury. If the matter was out of the jurisdiction of the Court, the judgment is void, being *coram non judice*. But the plea of "Not guilty" was sufficient, for as soon as it appeared that the Court had no jurisdiction, it was *coram non judice*. *Hilliard* v. *Webster* (*b*), *Tinnswood* v. *Pattison* (*c*), *Parker* v. *Elding* (*d*), *The King* v. *Johnson* (*e*), *Capes* v. *Jones* (*f*), *Comyn's* Dig., Tit. "Courts," (P) 15. *Comyn's* Dig., Tit. "Prerogative," (D) 28. *Tidd's* Practice, p. 960, shows the man-

(*a*) 1 Car. & Pay. 613.
(*b*) 6 Man. & Gr. 983.
(*c*) 3 Com. Ben. 243.
(*d*) 1 East. 352.
(*e*) 6 East. 583.
(*f*) 2 Com. Ben. 911.

ner in which you can take advantage at the trial, of a Statute excluding a Court from entertaining an action, and that in this mode of raising the objection to the jurisdiction of the Court, we were perfectly regular.

Mr. *Turner*, Q. C., Mr. *Leith*, and Sir *J. Bailey*, for the Respondent.

I. The first thing to be considered is the jurisdiction of the Supreme Court at *Bombay* to entertain this action: we admit the Appellant's argument, that the Court at *Bombay* is to be assimilated in all respects to the Supreme Court at *Calcutta*; for whatever powers or immunities were vested in the *Calcutta* Court, are conferred upon the Supreme Court at *Bombay*, by the Statute, 4 *Geo.* IV., c. 71. It will be necessary then to see what has been excepted out of the jurisdiction of the Supreme Court at *Calcutta*. The *Calcutta* Court was established by the Statute, 13 *Geo.* III., c. 63, and was a Court of general jurisdiction. The Court exercised jurisdiction over all persons, natives or others, within the local limits of the *Mahratta* ditch. It was doubtful whether, under this Statute, the Supreme Court had jurisdiction in revenue cases, and to settle this doubt, the Statute, 21 *Geo.* III., c. 70, was passed; and by the 8th section of that Statute, cases of "revenue" are expressly excepted out of the jurisdiction of the Supreme Court. It is necessary, to arrive at the proper meaning of the word "revenue," used in this Statute, to trace the origin of this tax. The East India Company's rights at the time of the passing of this Act of Parliament, were dependent upon two distinct titles: the one was by purchase of lands in *Calcutta;* quit-rents payable to the Company *qua* landlords, and *qua* the Govern-

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ment: the other the revenue title, which is quite distinct. That, in the first instance, proceeded in *Bengal*, under the grant of the *Dewanny*, first from the *Nawab*, and confirmed by *Shah Allah*, in the year 1756; that is the "revenue" which is spoken of in this Statute, the "revenue" of the Provinces of *Bengal*, *Bahar*, and *Orissa*. It has been called "revenue" or impost, in contradistinction to taxes, and is founded upon the right of the Mahomedan Government, as conquerors, and was adopted by the East India Company when they came in under the grant of the *Dewanny*. The question then is narrowed to this; is the term "revenue" used in this Act of Parliament to be construed as extending to all the revenue of the State, or only to that particular portion, namely, "land revenue?" At *Calcutta*, the Legislature had no power within its limits to raise any taxes, and a Special Act of Parliament was passed to enable them to do so. We submit that the term "revenue" used in the Statute, 21 *Geo.* III., c. 70, sec. 8, does not include "quit-rent" or ground-rents in the Island of *Bombay*, and that the Statute only applies to *Bengal*, *Bahar*, and *Orissa*. The "quit-rent," called a pension, in respect of which the trespasses complained of were committed, is not a "revenue" within the meaning of the 21 *Geo.* III., c. 70, sec. 8. The argument of the Appellants in treating this as "revenue" is not correct. The nature of this "quit-rent" is described in an agreement entered into between the Portuguese inhabitants of the Island of *Bombay* and the East India Company: it was to be paid in lieu of lands, which were, in the first instance, taken possession of by the East India Company, on coming into possession of the Island under the Charter of *Charles* the Second. It is

clear, therefore, that this rent comes within the category of rent payable by a tenant to his landlord, a perpetual ground-rent incapable of being raised; and not of land "revenue." The Regulation XIX. of 1827, so much relied upon by the Appellants, as excluding the Supreme Court's jurisdiction, does not apply to this "quit-rent," it relates only to "land revenue." The seventh section of that Regulation clearly establishes this position: it enacts "that the Revenue Judge shall decide all suits brought by him by contributors to the land revenue at the Presidency against the Collector, or any person of his establishment, on account of land revenue." It is clear from this, that the Revenue Judge has no jurisdiction over other suits. The construction put by the Court below upon the Statute, 21 *Geo.* III., c. 70, and the Regulation XIX. of 1827, was, that even if they applied so as to take away the jurisdiction of the Supreme Court, still, that an action would lie in the Supreme Court against any one who was liable to its jurisdiction generally, for any outrage committed in the collection of the revenue; and this opinion of the Court is in conformity with the case of *Doe dem. Peareemony Dossee* v. *Bissonauth Bonnerjee* (*a*), where it was held, that the Supreme Court of *Calcutta* was not precluded by the Statute, 21 *Geo.* III., c. 70, from exercising jurisdiction in a revenue case; and also by Sir *E. H. East*, in the case of *Budden Soorye* v. *O'Doyley* (*b*) and by this Court, in *Calder* v. *Halket* (*c*).

II. The defence to the want of jurisdiction of the Supreme Court, could not be put in issue under the plea of "Not guilty." The Defendants ought to have

(*a*) 1 Bignell's Calc. Reps. 1.
(*b*) East's Notes of Cases, 2 Morley's Digest, 172.
(*c*) 3 Moore's P. C. Cases, 28.

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pleaded the want of jurisdiction specially. The Supreme Court at *Bombay*, being the Court of highest jurisdiction, and having a general jurisdiction within the town of *Bombay*, could not be ousted of that jurisdiction, over any matter of complaint instituted therein, except by a plea to the jurisdiction, showing positively and affirmatively, what Court, other than the Supreme Court, had jurisdiction over such matter of complaint. How was the Court to arrive at the fact, that the question at issue was a matter of revenue, unless it was specially pleaded? The practice of the Indian Courts has been to plead, specially, in cases similar to this. 2 *Smoult's* "Rules and Orders of the Supreme Court at *Calcutta*," p. 65. Under the New Rules of the Court at *Bombay*, in an action of trespass, no defence, which confesses and avoids, can be given in evidence, under the plea of "Not guilty." All matters of confession and avoidance may be pleaded specially. That was the course pursued in *Calder* v. *Halket* (*a*), which was an action of trespass against a Judge of the *Foujdarry* Court in the *Mofussil*: the Defendant justified himself under this very Act, the 21st *Geo.* III., c. 70, s. 24, but this Court held, that he was not justified by it. So in *Taaffe* v. *Lord Downes* (*b*), an action was brought for trespass and false imprisonment, against the Chief Justice; and, although the Defendant had protection, by law, being a judicial officer, he pleaded specially, first, the general issue; secondly, not guilty, as to part; and as to the residue, justification, that the acts done by him, were done in the exercise of his judicial functions. Again, in *Mostyn* v. *Fabrigas* (*c*), Lord *Mansfield* said, that "nothing was more clear,

(*a*) 3 Moore's P. C. Cases, 28.

(*b*) Note, 3 Moore's P. C. Cases, 36. (*c*) 1 Cowp. 172.

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than that if the Court has not a general jurisdiction of the subject-matter, the Defendant must plead to it." The cases cited by the Appellants, of its being patent upon the face of the proceedings, that the Court had no jurisdiction, do not apply. How is the Court to ascertain whether it is a class of cases which is within the general jurisdiction of the Court, or within the particular exception to that jurisdiction, until the Court tries the question? But the Defendants, by pleading "Not guilty," admitted the jurisdiction of the Supreme Court, and waived all objection thereto, and it was not competent to take the objection at the trial.

Lord CAMPBELL,

22nd Feb. 1850.

After stating the facts of the case, proceeded as follows:—Two questions arise: First, whether the objection to the jurisdiction of the Court could be taken, under the plea of "Not guilty;" and, Secondly, whether the objection be well founded.

On the first question, we have had some difficulty, and my own opinion has varied during the argument. It appears from the Books of Practice cited, that it has been usual to plead such a defence in the Indian Courts, and, certainly, the convenient course would be to put it upon the record. The issue joined, seems simply to be, whether the alleged trespasses were committed by the Defendants, and it is urged, that the necessity for a special plea is rendered more urgent by the New rules, introduced at *Bombay*, which provide, that in actions of trespass, under the plea of "Not guilty," no defence shall be given in evidence which confesses and avoids.

However, looking at the Statutes and Charters under which this Court is constituted, and to the cases, in

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point, which have been decided in Westminster Hall, we have come to the conclusion, that the Court, under the plea of "Not guilty," was bound to admit the objection.

By an Act of Parliament, the 37th *Geo.* III., c. 142, s. 9, His Majesty was empowered, by Charter, or Letters Patent, under the Great Seal, to erect and establish a Court of Judicature at *Bombay*; but the 11th section of that Act expressly decided that such Court, so to be erected, "should not have or exercise any jurisdiction in any matter concerning the revenue under the management of the Governor and Council respectively, either within or beyond the limits of the town, fort, or factory of *Bombay*, or concerning any act done according to the usage and practice of the country, and the Regulations of the Governor and Council."

In conformity with the provisions of this Act, a Court of Judicature, styled, "The Court of the Recorder of *Bombay*," was established by Letters Patent under the Great Seal of *Great Britain*, bearing date the 20th day of *February*, 1798. These Letters Patent contained a clause, providing that "the said Court should not have, or exercise, any jurisdiction, in any matter concerning the revenue, under the management of the said Governor and Council respectively, either within or beyond the limits of the said town and Island of *Bombay*, or the forts or factories subordinate thereto, or concerning any act done according to the usage and practice of the country, or the Regulations of the Governor and Council."

Subsequently, in the year 1823, an Act of Parliament was passed, the 4th *Geo.* IV., c. 71, the 7th sec-

tion of which provided, " that it should be lawful for His late Majesty, King *George* the Fourth, by Charter, or Letters Patent, under the Great Seal of *Great Britain*, to erect and establish a Supreme Court of Judicature at *Bombay*, aforesaid, to consist of such and the like number of persons, to be named, from time to time, by His Majesty, his heirs, and successors, with full power to exercise such civil, criminal, admiralty, and ecclesiastical jurisdiction, both as to natives and British subjects, and to be invested with such powers and authorities, privileges, and immunities, for the better administration of the same, and subject to the same limitations, restrictions, and control, within the said town and Island of *Bombay*, and the limits thereof, and the territories subordinate thereto, and within the territories which now are, or hereafter may be, subject to, or dependent upon, the said government of *Bombay*, as the said Supreme Court of Judicature in *Bengal*, by virtue of any law, now in force and unrepealed, doth consist of, is invested with, or subject to, within the said *Fort William*, or the places subject to, or dependent on, the Government thereof."

And by the 9th section of the same Act, it was provided, " That so much of the said Charter, granted by His said late Majesty, King *George* the Third, for erecting the Court of the Recorder of *Bombay*, as relates to the appointment of such Recorder, and the erecting of such Courts of Judicature at *Bombay*, in case a new Charter shall be granted by His Majesty, his heirs, or successors, and shall be openly published at *Bombay*, from and immediately after such publication, shall cease and determine, and be absolutely void, to all intents and purposes whatsoever, and all

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powers and authorities granted by the said Act of the 37th year of His said late Majesty, King *George* the Third, to the said Court of the Recorder at *Bombay*, shall cease and determine, and be no longer exercised by the Supreme Court of Judicature to be erected in virtue of this Act, in the manner and to the extent hereinbefore directed."

The Supreme Court of Judicature at *Fort William*, in *Bengal*, to which reference is made in the 7th section of the last-recited Act, was established by Letters Patent, under the Great Seal of *Great Britain*, bearing date the 26th day of *March*, 1774; and by an Act of Parliament passed in the year 1791, (the 31st *Geo.* III., c. 70, s. 8,) it was enacted, "That the said Supreme Court shall not have, or exercise, any jurisdiction, in any matter concerning the revenue, or concerning any act or acts ordered or done in the collection thereof, according to the usage and practice of the country, or the Regulations of the Governor-General and Council." Therefore, that clearly now regulates the existing Court of *Bombay*.

The Supreme Court of Judicature at *Bombay* was established by Letters Patent, under the Great Seal of *Great Britain*, bearing date the 8th day of *December*, 1823; and the Letters Patent contain the following clause, "Nor shall the said Court have or exercise any jurisdiction in any matter concerning the revenue under the management of the said Governor and Council of *Bombay* respectively, either within or beyond the limits of the said town, or the forts and factories subordinate thereto, or concerning any act done, according to the usage of the country, or the Regulations of the Governor and Council of *Bombay* aforesaid."

Therefore, by Statutes and Charters, of which the

Judges of the Supreme Court of *Bombay* are bound to take judicial notice, they are forbidden to exercise any jurisdiction in any matters concerning the revenue under the management of the Governor and Council, or any act done according to the Regulations of the Governor and Council respecting the collection of the revenue: any such matter arising before them was declared to be *coram non judice*.

We are not prepared to say, how it might have been, if, when the Plaintiff's case was closed, nothing more had appeared, than that the Defendants entered his house at *Bombay*, and carried away his lamp.

Possibly, under the plea of "Not guilty," the Defendants might not have been at liberty to adduce evidence which went in confession and avoidance, and the facts ousting the Court of its jurisdiction might never have been judicially before the Judge. But the Plaintiff, himself, proved the controversy respecting his liability for the arrears of the quit-rent, the demand made upon him for the arrears, and the warrant to levy them by distress: therefore, supposing, upon these facts, the Court had no jurisdiction to try the cause, was the Court to try it, and give judgment for the Plaintiff, because the Defendants had omitted to plead specially?

This bears no resemblance to the cases where there is a plea in abatement to the jurisdiction of the Court, which must point out another Court before which the matter is cognizable. If the defence has been put upon the record, it would have been in the form of a plea in bar; and if well founded, it would have been sufficient, without pointing out any other Court in which the suit might be instituted.

If the Court is forbidden, by law, to try this cause,

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neither the "New rules," nor any omission of the Defendants, would give the Court jurisdiction over it. The facts ousting the jurisdiction having been brought judicially to the notice of the Judge, and with perfect regularity, he usurps a jurisdiction which does not belong to him, if he proceeds and gives judgment for the Plaintiff. Therefore, these facts coming out, for the first time, on the trial of an issue, although they may seem irrelevant to that issue, he must have power, by directing a nonsuit, or by some other means, to stop the trial; and, accordingly, in some Statutes, which take away the jurisdiction of Courts in particular cases, there is a power expressly given to nonsuit, and if the jurisdiction is clearly taken away by the facts proved, a similar power may be here implied.

The cases cited to us, of Judges refusing to proceed in the trial of ludicrous wagers, do not appear to be in point, for they are not founded on any rule of law, but upon discretion, which has been differently exercised by different Judges.

However, the case of *Parker* v. *Elding* (1 East. 352) appears to us a strong authority in favour of the Defendants. That was an action of assumpsit for work and labour, with a plea of non-assumpsit only. The Plaintiff proved the existence of his demand, to the amount of £1. 18*s*., and no more. The debt arose in the Isle of *Ely*, for which, by a public Act of Parliament, a Court of Requests was established, with a clause, "that no action for any debt, not amounting to 40*s*., and recoverable by that Act, in the said Court of Requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof, in any of the King's Courts, at *Westminster*." The Defendant resided in the Isle of *Ely*, where the debt

was contracted. The objection of want of jurisdiction being made by the Defendant, the Plaintiff answered that it could not be taken under the plea of non-assumpsit, and that upon the issue joined, he was clearly entitled to a verdict. But *Grose*, Justice, who tried the cause, directed a verdict to be entered for the Defendant, giving leave to the Plaintiff to move to enter a verdict for the £1. 18*s*. Such a motion being made, Lord *Kenyon* said: "Here is a general law, of which we are bound to take notice, which says, that no action shall be brought against any person residing within the jurisdiction, for any debt not amounting to 40*s*., and recoverable by virtue of that Act. The demand in question is of that sort. How then can we say, that the Plaintiff shall recover it against the positive direction of the Act? This being directed to be taken as a general Act, is part of the general Law of the land." The other Judges concurred, and a rule to show cause was refused.

In another case, of *Taylor* v. *Blair* (3 Term Rep. 452), where, by a similar Court of Requests' Act, a power was expressly given, on an action being brought in the Superior Courts, "to plead the Act in bar," and there having, under the plea of non-assumpsit, been a verdict for less than 40*s*., Lord *Kenyon*, in refusing leave, after verdict, to enter a suggestion, observed, "The Defendant might have pleaded the Statute, or, perhaps, if the objection had been made, at the trial, the Plaintiff would have been nonsuited."

Less reliance is to be placed upon the case of *Hilliard* v. *Webster* (6 Man. & Gr. 983), as there, the Statute specifically pointed out the duty of the Judge, on the want of jurisdiction appearing before him. An Act for regulating the proceedings of a local

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Court, enacted, "that in case any personal action, for the recovery of any debt, shall be commenced out of the jurisdiction, and it shall appear to the Judge of the Court where such action shall be tried, that the debt to be recovered in such action does not amount to 40*s.*, and the Defendant shall prove that, at the time of commencing such action, he was resident within the jurisdiction, then, unless the Judge shall certify that there was reasonable ground for bringing the action for more than 40*s.*, such Plaintiff shall not recover, but be non-suited in such action." Assumpsit being brought in a superior Court, and non-assumpsit only pleaded, it appearing that the debt to be recovered was under 40*s.*, and that the Defendant was resident within the jurisdiction of the local Court, a non-suit was entered, which the Court of Cómmon Pleas refused to disturb. The Plaintiff's Counsel then strenuously contended that, under the "New rules," a special plea was necessary, to let in the defence; but *Maule*, Justice, said, that upon such a matter the new rules made no difference.

We are, therefore, of opinion, that if the Supreme Court of *Bombay* had not jurisdiction over this cause of action, the Judge ought either to have directed a nonsuit, or a verdict to be entered for the Defendants.

Upon the second question we have not been able to entertain any doubt. Whether the Plaintiff might have redress before any other tribunal, can only be material in a doubtful construction of the Statutes and Charters establishing the Court in which the action was brought. If, by these Statutes and Charters, its jurisdiction in this action is clearly taken away, our decision could not be influenced by the consideration, that the Plaintiff is left without remedy.

We are of opinion, that the "quit-rent" being part of the revenue of the East India Company, the cause of action is a matter concerning the revenue under the management of the Governor and Council of *Bombay*, and concerning an act done according to the Regulations of the Governor and Council of *Bombay*. The "quit-rent" goes into the treasury of the East India Company, and the Defendants *bonâ fide* professed to act under Regulation XIX. of the Regulations made by the Governor and Council of *Bombay*, giving power to the Collector to distrain for all arrears of rent due to the Company. For this purpose no distinction can be taken between this "quit-rent" and the rent due from the *Rajah* or *Zemindar*, in respect of the land which they occupy and cultivate.

The point, therefore, is, whether the exception of jurisdiction only arises where the Defendants have acted strictly, according to the usage and practice of the country, and the Regulations of the Governor and Council. But upon this supposition the proviso is wholly nugatory; for if the Supreme Court is to inquire whether the Defendants in this matter concerning the public revenue were right in the demand made, and to decide in their favour only if they acted in entire conformity to the Regulations of the Governor and Council of *Bombay*, they would equally be entitled to succeed, if the Statutes and the Charters contained no exception or proviso for their protection. Our books actually swarm with decisions putting a contrary construction upon such enactments, and there can be no rule more firmly established, than that if parties *bonâ fide* and not absurdly believe that they are acting in pursuance of Statutes, and according to law, they are entitled to the special protection which the Legis-

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lature intended for them, although they have done an illegal act. In this case it may well be that the warrant against the goods of *Tookaydass* did not authorize the taking the goods of *Hurgovundass*, or even that *Hurgovundass* might not be liable for the arrears of "quit-rent" which accrued before he became owner of the house. Still the Collector was evidently of opinion, that a distress might be made for the whole of the arrears due, and that it was sufficient to introduce into the warrant the name of *Tookaydass*, in whose name the house continued to be registered. The other Defendant never could have doubted the sufficiency of the warrant. If Indian revenue-officers have fallen into a mistake, or without bad faith have been guilty of an excess in executing the duties of their office, the object of the Legislature has been, that they should not be liable to be sued in a civil action before the Supreme Courts. Liability to be prosecuted criminally, stands upon a totally different foundation.

We must view the question of the jurisdiction of the Supreme Courts of *India* in cases of revenue, upon the supposition that there are peculiar Courts in which these questions are to be discussed and decided. In *England*, if such an action were brought in any other Court than the Court of Exchequer, it would be a mere matter of course to remove it into that Court, and to prevent any other Court taking cognizance of it. Thus in the 7th year of *James* the First, process issued out of the Exchequer to levy an amercement of £10; the bailiff levied the amercement. *J. S.*, the person on whom it was levied, brought trespass, and it was said by the Barons, and ordered, that if *J. S.* will bring an action for distraining of this amercement, be it law-

fully imposed or not, yet *J. S.* shall be restrained to sue in any other Court but in this, and here he shall sue in the office of Pleas, for the bailiff levied it as an officer of this Court. *Lane's* Exchequer Reps. 55. The same doctrine is to be found in *Cawthorne* v. *Campbell* (1 Anst. 205), and I can testify, that I myself, while I had the honour of being Attorney-General to the Crown, in several instances stopped actions commenced in the Courts of King's Bench and Common Pleas by an application to the Court of Exchequer, upon an allegation, that the King's revenue came in question in the subject to be discussed; without attempting to show that the parties impleaded had acted lawful, and had a good defence.

We are, therefore, bound to differ from the Judge below, who says, "that the jurisdiction of his Court has not been taken away, when the act complained of is not warranted by the country, or by the Company's Regulations." If it concerned the revenue, or was a matter concerning an act *bonâ fide* believed to be done according to the Regulations of the Governor and Council of *Bombay*, his jurisdiction was gone, although *primâ facie* it appeared to be a trespass over which his jurisdiction might be properly exercised.

We hope that if the Plaintiff was injured, he might have had redress by a different proceeding; but at any rate, we are of opinion, that he was not entitled to redress by suing in the Supreme Court at *Bombay*, and we shall humbly advise Her Majesty, that the judgment appealed against should be reversed.

The effect of their Lordships' decision will be, to make the rule *nisi* of the 14th of *June*, 1847, absolute.

MUTTYLOLL SEAL - - - - *Appellant*,

AND

ROBERT O'DOWDA - - - - *Respondent*.*

On Appeal from the Supreme Court of Judicature, at Fort William in Bengal.

25th, 28th & 29th Feb., 1848.

A Bill of Sale and assignment of goods, described as being in certain warehouses belonging to A., was given by him for the loan of a sum expressed to have been paid on the day of the date thereof. Upon an action of trover brought against the assignee of A., who had seized the goods, it appeared, in evidence, that a portion only of the goods was in the warehouse specified at the date of the sale, and that no part of the loan was paid on that day, the same being discharged by instalments a few days afterwards: whereupon the Judges of the Supreme Court held, that there had been no valid transfer, and, consequently, no conversion, and gave an interlocutory judgment and verdict in accordance with such view.

Held by the Judicial Committee, on appeal from such judgment and verdict, and from an order refusing a new trial, that the judgment and verdict were not justified by the evidence, and must be reversed, and a new trial granted.

THIS was an action of trover brought by the Appellant against the Respondent, the assignee of the estate and effects of the firm of Messrs. *Tulloh* & Co. of *Calcutta*. The circumstances which led to this action, were as follows:—

In the year 1846, the firm of *Tulloh* & Co. carried on business, in *Calcutta*, as merchants and brokers. The firm had, for some time, had extensive dealings in trade with the Appellant, and, on the 30th of *April*,

* Present: Members of the *Judicial Committee*,—Lord Langdale, Lord Campbell, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillor,—*Assessor*,—Sir E. Ryan, Knt.

1846, was indebted to him in a sum amounting to £70,000, for which he held securities. At that time, they had a pressing occasion for an immediate advance of money, and Mr. *Dowleans*, one of the partners, in the name of the firm, applied to the Appellant for a loan of Rs. 60,000, who was willing to entertain the request, but required a fresh security for the advance. *Dowleans* proposed that *Tulloh* & Co. should give him an assignment, by way of mortgage, of a quantity of wine, ale, and other liquors belonging to the firm. The Appellant had a draft bill of sale, and assignment, prepared, and delivered it to *Dowleans*, informing him, that if the firm would execute a bill of sale, and give him possession of their own stock of wines and other liquors, he would, at once, advance the sum of Rs. 15,000, which was required immediately, and the balance of the Rs. 60,000, as there was occasion for it. At that time, the wines and other liquors in question, were in two different *godowns*. or warehouses, one called the *Mission Row*, or *Hickey Bailey's godown*, which contained exclusively their own wines and liquors, and the other called the Bengal Club *godown*, in which the goods belonging to the firm were mixed up with consignments from their constituents, entrusted to them for sale. The value of the wines and other liquors, which were their own property, was between sixty and seventy thousand rupees. *Dowleans* agreed to the terms required by the Appellant, and, on the next day, the 1st of *May*, the following bill of sale and assignment (copied from the draft prepared by the Appellant) and memorandum was written out by Mr. *Buckland*, another of the partners,

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and signed by him, in the name of the firm of *Tulloh* & Co. :—

"We do acknowledge to have this day borrowed and received, from *Baboo Muttyloll Seal*, the sum of Company's rupees 60,000; and, in consideration of the same, we do hereby bargain, and sell, and assign, to the said *Baboo Muttyloll Seal*, all and every the goods, merchandizes, chattels, and effects, now lying and being in certain *godowns* and premises of and belonging to us, in *Mission Row*, *Calcutta*, known under the name of *Hickey Bailey* and Company's *godowns*, to hold and receive, as and for his own goods, chattels and effects: and we do hereby warrant the same to the said *Muttyloll Seal*, against us, and each of us, our executors and administrators, for ever. Dated the 30th of *April*, 1846, *Tulloh* & Co.

"Be it known that, on this day, possession of the said several goods and merchandizes, chattels and effects, was given to the said *Muttyloll Seal*, Esquire, by delivering to him the keys of the several *godowns*, in which the said goods are stored.

"Witness, "*Calcutta*, 1st *May*, 1846.
"*John Hughes*. "*Tulloh* & Co."
"*Peter Palmer*."

Neither *Hughes* nor *Palmer*, whose names appeared as attesting witnesses to this statement, and who were at that time clerks in the employ of *Tulloh* & Co., actually saw it executed by *Buckland*; but being well acquainted with his handwriting, they added their signatures afterwards on the same day, at the request of *Dowleans*.

Immediately after the bill of sale was made out and signed, the Appellant advanced to *Tulloh* & Co.,

Rs. 15,000. Within two or three days afterwards, he advanced to them two other sums, one of Rs. 10,000, and the other of Rs. 4,300; and on the 9th of *May*, he accepted a bill of exchange for Rs. 31,611. 1. 6., drawn upon him by *Tulloh* & Co., and payable three days after date, and other large sums were also paid by him on their account. These monies were advanced upon security of the goods agreed to be assigned to the Appellant.

Immediately after the Bill of Sale was signed by *Tulloh* & Co., *Dowleans* gave directions to one of the clerks to make out a correct list of all the goods in question, and transfer them to the custody of the *sircar*, or clerk of the Appellant. He then, accompanied by *Palmer* and another of the clerks of *Tulloh* & Co., took with him *Gangooly*, the managing clerk of the Appellant, and went to the *Mission Row godown*, and told their warehouseman, *Rajoo Dutt*, to give possession of it to *Gangooly*, and also to make over to him all the wines and liquors stored in it, and also those belonging to *Tulloh* & Co., which were in the Bengal Club *godowns*, but not those which were the property of their constituents. *Gangooly* then took possession of the warehouses, and sent for two locks, one of which he caused to be placed on the door of the *Mission Row godown*, and the other on that of the Bengal Club *godown*. Some of the goods in the latter *godown* were removed the same day; but as the quantity was large, and the goods belonging to *Tulloh* & Co., as their own property, could not be immediately separated from their consignments, it took five days to remove them all. Until this was completed, *Rajoo Dutt* kept padlocks of his own upon the doors of the *Mission Row* and the Bengal Club *go-*

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downs, and *Gangooly* stationed every evening a watchman at each door. On the fifth day the *Mission Row godown* was quite full, and a list was made out by *Ramdhone Bose*, one of the clerks of the Appellant, of all the goods in that *godown*, as well as of those that still remained in the Bengal Club *godown* belonging to *Tulloh* & Co. The other goods in the Bengal Club *godown*, which consisted of consignments, had in the meantime been removed, and none remained there but those which belonged exclusively to *Tulloh* & Co. *Gangooly* then informed *Dowleans* that the *Mission Row godown* was full, and the keys of the two padlocks, which *Rajoo Dutt* had kept up to that time, were delivered up to him.

During this interval, *Tulloh* & Co. sometimes sent for different quantities of the wines and liquors which were in the possession of the Appellant, but, with one or two exceptions, paid in cash for whatever they received out of the *godowns* before mentioned, and a list of these deliveries, and the amounts paid upon each, was kept by *Gangooly*.

On the 19th of *May*, the firm of *Tulloh* & Co. was, under the provisions of the Act, 9 *Geo.* IV., chap. 73, entitled, "An Act to provide for the relief of Insolvent Debtors in the *East Indies*," adjudged by the Insolvent Debtors' Court at *Calcutta* to have committed an act of insolvency; and on the following day the Respondent was duly appointed assignee of their estate and effects.

On the 26th of *May*, the Respondent turned the servants of the Appellant out of possession of the *Mission Row* and Bengal Club *godowns*, and took away from them the keys of the doors, and seized the goods contained in them, which he refused to deliver up.

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The Appellant, on the 9th of *June*, 1846, brought an action of trover, in the Supreme Court of *Calcutta*, against the Respondent, and laid the damages at Rs. 100,000. The Respondent pleaded two pleas to the declaration: First, not guilty; and, Secondly, denial of Plaintiff's possession.

The cause was tried before Mr. Justice *Grant* and Mr. Justice *Seton*, on the 13th of *July* and two following days, when the above facts were established, by evidence, on the part of the Plaintiff. The Court gave interlocutory judgment in the nature of a verdict for the Defendant, on both the issues raised by the pleadings. The following reasons were delivered by Mr. Justice *Grant*:—"We are of opinion, that there must be a verdict for the Defendant. The assignment which is put in by the Plaintiff, bears date the 30th of *April;* and dates, in a matter of this sort, are things of great importance. It states, the borrowing and receipt of Rs. 60,000, on that date, when it appears, from the evidence offered by the Plaintiff, that no money was, upon that day, borrowed or received; and it states, that goods in the *godown* in *Mission Row*, called *Hickey Bailey's godown*, were delivered to the Plaintiff, when, in fact, it appears, that few of the goods in question were, at that time, in that *godown*, and no goods were then delivered to the Plaintiff. To this document is appended a memorandum, bearing date the 1st of *May*, signed by *Tulloh* & Co., to which is annexed a false attestation, the witnesses who attest not being, either of them, present when the signature was affixed. We think, therefore, that the foundation of the Plaintiff's claim fails him, for the document put in to prove this transaction, states one entirely different from the trans-

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action which he has proved. The document being disproved by the evidence; upon the question of law we give no opinion, because it is unnecessary; but, if it were necessary, I should have little difficulty in giving my opinion, that there was no valid transfer of possession, according to the old case in Lord *Coke's* Reports (*a*), and every case upon the subject since; all which show, that the transfer of possession must be open and notorious, to prevail against the right of the assignee of the Insolvent Court."

The Appellant afterwards applied for a rule *nisi*, for a new trial, on two grounds:—First, that the verdict was against evidence; and, Secondly, that there was a misdirection in point of law. The Court refused the rule, as it "considered that the verdict was not against evidence, and that there was no misdirection; that the case was decided on the matters of fact solely; viz., that the evidence given by the Plaintiff did not support the written document set up by him as the foundation of his case, but was in contradiction to it."

The Appellant appealed from the interlocutory judgment of the Court, in the nature of a verdict, and also from the Order, refusing a new trial, to Her Majesty in Council.

Mr. *Wigram*, Q. C., Mr. *Leith*, and Mr. *Forsyth*, for the Appellant.

This judgment cannot stand. The reasoning of the Court, both on delivering interlocutory judgment, and in refusing a new trial, is inapplicable to the case. It was founded on an erroneous view of the law. This is not an action brought on an executory contract

(*a*) Twyne's Case, 3 Rep. p. 80.

contained in a written instrument. The only question was, whether there was a valid transfer of the goods to the Appellant. The evidence was consistent with the Bill of Sale, but the Court, in its judgment, does not profess to consider the difference between the Bill of Sale and the facts proved in evidence, as a badge of fraud, in which view alone it could have any bearing upon the question at issue in the cause; but it treats the difference between the Bill of Sale and the facts proved in evidence, as if it were a variance in itself fatal to the Plaintiff's case. We submit, however, that unless there had been some question of fraud, this difference was wholly immaterial. It made no difference as to the legal effect of the assignment, whether the whole of the money was advanced at one time or by instalments, or whether all or part only of the goods, in question, were, at that time, delivered to the Appellant. The only question for the Court to consider, was, whether the goods were really pledged, for a *bonâ fide* advance, and this fact is established by the evidence. The Court declined to give an opinion that the transfer was invalid, on the ground of not being open and notorious, although the Judge says, that if it were necessary he would have little difficulty in deciding against its validity on that account. Upon this point, also, we submit that the Court is mistaken, for all the circumstances attending the assignment negatived fraud, and gave sufficient notice of the transfer of the goods. The delivery took place openly, and it was notorious to all. Even if *Tulloh* & Co. had retained possession, it would have made no difference, as there was no fraud, and the Plaintiff's title was not impeachable under the Indian Insolvent Act, upon their reputed ownership.

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It is not even suggested by the Court, that the assignment was voluntary on the part of *Tulloh* & Co., so as to be defeated by force of the 28th section of the Indian Insolvent Act, 9 *Geo.* IV., c. 73. The evidence established, that the legal property and right of possession in the goods were, at the time of the seizure by the Respondent, vested in the Appellant; that being so, the Respondent was guilty of a conversion. The verdict was entered, and judgment signed by the Respondent on both the issues raised by the pleadings, whereas the evidence established the fact of a conversion, and, therefore, even if the Respondent had been entitled to a verdict on the second issue, still the verdict on the issue of "not guilty" ought to have been entered for the Appellant. A new trial ought to have been granted to the Appellant, as the verdict was against evidence, and there was a misdirection in point of law. They referred to the following authorities: *Lady Arindell* v. *Phipps* (*a*). *Martindale* v. *Booth* (*b*). *Manton* v. *Moore* (*c*). *Smith* v. *Topping* (*d*). *Twyne's Case* (*e*). *Parke* v. *Mears* (*f*). *Grellier* v. *Neale* (*g*). *Cadogan* v. *Kennet* (*h*). *Fitzgerald* v *Elsee* (*i*).

Mr. *Parker*, Q. C., and Mr. *Greenwood*, for the Respondent.

We submit, that the conversion was not made out, and that, upon the evidence, the goods mentioned in the declaration were not sufficiently connected with the places, times, and goods spoken of by the wit-

(*a*) 10 Ves. 139.
(*b*) 3 Bar. & Ad. 498.
(*c*) 7 Term. 67.
(*d*) 5 Bar. & Ad. 674.
(*e*) 3 Co. Rep. 80.
(*f*) 2 Bos. & Pull. 217.
(*g*) Peake's N. P. Cases, 146.
(*h*) Cowp. 435.
(*i*) 2 Camp. 635.

nesses. Upon the evidence adduced, the Court could come to no other conclusion, than that the Plaintiff failed to prove any assignment to himself of the goods taken by the Defendant; and viewing the finding of the Court as a verdict of a jury, it ought not to be disturbed. It is clear, that under the circumstances proved, even if the Plaintiff had succeeded in proving an assignment to himself, such assignment would have been void as against the creditors of Messrs. *Tulloh* & Co., and especially as against the Defendant, as assignee of the insolvents, under the statute, 9 *Geo.* IV., c. 73. They cited *Battersbee* v. *Farrington* (*a*). *Belcher* v. *Prittie* (*b*).

The Right Hon. Dr. LUSHINGTON:

Their Lordships are unanimously of opinion, that the Appellant is entitled to a new trial, as they consider that the Court below has not weighed all the circumstances in evidence, with sufficient accuracy to justify the verdict it has given. Their Lordships do not think it right, or fit, to enter into the particular reasons the learned Judges below have given, but consider that there should be a new trial. The opinion of their Lordships is, therefore, that the judgment of the Court below be reversed, and that the rule for a new trial be made absolute.

(*a*) 1 Swanst. 106. (*b*) 10 Bing. 408.

RAS MUNI DIBIAH - - - - *Appellant,*

AND

PRAN KISHEN DAS - - - - *Respondent.**

On Appeal from the Sudder Dewanny Court at Calcutta.

27th June, 1818.

In the case of a mortgaged *Zemindary*, partly situated in two separate districts —Held that an order, made by the Judge of the Civil Court of one district, for foreclosure of the whole of the mortgaged property, was a sufficient compliance with the provisions of Bengal Reg. XVII. of 1806, sec. 8, as to give the Civil Court of that district jurisdiction to entertain a suit relating to the whole property comprised in the mortgage, and to decree a foreclosure.

The mortgagor, by deed, authorized his widow to adopt a son. After his death his widow exercised the power, and adopted a boy, a minor, who became by the Hindoo law, the legal representative of the deceased. The order for foreclosure was served on the widow only. Held, further, that, as the widow had a life interest, and was also guardian of the minor, such service was sufficient.

THIS was a suit for foreclosure, brought under the following circumstances:—

On the 27th of *October*, 1830, *Rae Bejay Kishen*, in consideration of the sum of Rs. 37,000, executed a Bill of Sale of a moiety of his *Zemindary* of *Sumskar Bhedurpoor* in the *pergunna* of *Sumskar*, to one *Ram Soondur Das*. This *Zemindary* was partly situate in the district of *Bheerbhoom* and partly in *Moorshedabad*, and included, for revenue purposes, in the district of *Moorshedabad*. The deed, after reciting the possession and title of *Rae Beejay Kishen* to the *Zemindary*, and the nature of the transaction, contained the following

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillor,—*Assessor*,—Sir A. Johnston.

declaration on the part of *Rae Bejay Kishen*:—"I have sold all my right and title in that half portion of the said *talook* and its appurtenances, cultivated and waste lands, entire within its four boundaries, land and water, rent and duties, except those abolished by Government, all the lands cultivated and waste profits of wood, water, and rushes, forest, fruit, lakes and marshes, tanks, gardens, fruit, and barren trees, except endowed lands, and rent free, and those continued by Government. You shall take possession of it, and exclude my name from the Government Records, and have your name entered for the *talook* in the Collector's office, pay the Government revenue, and enjoy it in ease with your sons, grandsons, and others in succession; and you have the right of granting and selling the half portion of that estate with its appurtenances, and I and my heirs have no concern with it: if I and my heirs at any time make a claim for it, it is false and void."

On the same day *Ram Soondur Das* executed to *Rae Bejay Kishen* a deed of defeazance, to the effect, that if the purchase-money and interest was paid to him within five years from that date, the Bill of Sale was to be returned; otherwise, after the expiration of that term, the property was to be absolutely vested in *Ram Soondur Das*.

Rae Bejay Kishen, the mortgagor, died in 1832, childless, leaving a widow, *Ras Muni Dibiah*, the Appellant. By a deed, dated the 24th of *February*, 1832, made previous to his decease, he directed that his widow should possess his *Zemindary* and enjoy it during her lifetime, and granted his widow permission to adopt a son or sons; and directed that on her death, such adopted son or sons should

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inherit all his property; and directed her to pay off and discharge his morgage debts, by selling or mortgaging any portion of his *Zemindary*. The Appellant entered into possession of the estate and *Zemindary* of her deceased husband, and, as she was a minor, a guardian and manager was appointed by the Court of Wards, and the estate was placed under their control.

The mortgage money and interest was not repaid by the mortgagor during his lifetime, or by his widow after his decease. Before any proceedings were taken, the mortgagee died, leaving two sons, the eldest of whom, *Pran Kishen Das*, the Respondent, afterwards represented his estate.

The Appellant, under the authority given her by *Rae Bejay Kishen*, adopted a boy, as son to her deceased husband.

As the term stipulated in the deed of defeazance had expired, the Respondent, on the 30th of *October*, 1835, pursuant to Reg. XVII. of 1806, presented a petition to the Civil Court of *Moorshedabad*, where the property in dispute was partly situate, for an order of foreclosure to be issued against the Appellant and *Ooday Churn*, the guardian and manager, then in possession of the estate. By an order of the same date, it was ordered, that "the Appellant and her guardian and manager should pay the said sum (Rs. 37,000) with interest, within one year in full, and at once, otherwise they were to have no right whatever to the mortgaged property, after the expiration of the term contained in this order." This order was served on the Appellant and *Ooday Churn*, but not on the adopted son.

The principal and interest not having been paid within the year fixed by the order of foreclosure,

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the Respondent filed his plaint on the 2nd of *February*, 1837, in the *Zillah* Court of *Moorshedabad*, against the Appellant, as the widow of *Rae Bejay Kishen*, and adoptive mother and guardian of *Rae Kishen Chund*, and *Gopal Kanth Bhuttacharj*, who had been appointed manager in the place of *Ooday Churn*; and as the estate still continued under the Court of Wards, the Plaintiff made the Collector of *Moorshedabad*, a Defendant thereto; to obtain possession of the moiety of *Sumskar Bhedurpoor*, with all its appurtenances and rights and profits collected from it.

The Collector of *Moorshedabad*, by his answer, took two objections to the jurisdiction of the Court to entertain the suit: First, that the order to foreclose, obtained by the Plaintiff from the Civil Court of *Moorshedabad*, was contrary to the provisions of Reg. XVII., sec. 8, of 1806, the property in dispute being, as he alleged, situate in the district of *Beerbhoom*, from which Court the Plaintiff ought to have obtained the order to foreclose; and, Secondly, he contended that the Civil Court of *Beerbhoom* alone, had jurisdiction to entertain the suit.

Gopal Kanth Bhuttacharj, by his answer, also insisted, that the order to foreclose should have issued from the Civil Court of *Beerbhoom*; and further objected to the validity of the order, as it had not been served on the minor adopted son, and referred to the case of *Mahomud Rae* v. *Raja Kishen Chunder*, No. 134 of 1836, in support of this objection. And he further denied the justness of the demand, contending that the Plaintiff's father had not advanced to *Rae Bejay Kishen*, Rs. 37,000, but had only paid him Rs. 25,900, and that he took the remaining Rs. 11,100, as discount, contrary to the Regulations.

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The Plaintiff replied to the answer of the Collector, insisting, that the order to foreclose was properly obtained from, and the suit properly brought in, the *Moorshedabad* Court, according to Reg. XVII. of 1806, the property in dispute being situate in that district, as well as *Beerbhoom;* and he relied on an order which he had obtained, upon Petition, from the *Sudder* Court for a trial of the cause in the *Moorshedabad* Court. On the 1st of *March*, 1838, he replied to the answer of *Gopal Kanth Bhuttacharj*, insisting, for the reasons stated in his reply to the Collector, that the proceedings were regular, and submitted, that the infant was no party to, and did not require to be served with, the order to foreclose, inasmuch as the estate was under the control of the Court of Wards; and denied the allegation respecting the payment of Rs. 25,900, instead of Rs. 37,000, as alleged in the answer.

The suit was referred for trial to the Court of the Principal *Sudder Amin* of the Civil Court of *Moorshedabad.*

The case of the Respondent was proved by the instrument of sale, and the production of three of the attesting witnesses, who proved the execution by *Rae Bejay Kishen*, and the payment of the money by *Ram Soondur Das*, and the execution and delivery by the latter of the agreement of defeazance. The Defendants examined no witnesses, but during the hearing an application was made for witnesses to be summoned, which the Court refused.

The Principal *Sudder Amin* made his decree on the 29th of *August*, 1838, the material part of which was in these terms:—" The answer of *Ras Muni Dibiah* is nothing but mere surplusage, for although the *Ze-*

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mindary claimed is both in this and the *Beerbhoom* district, the order for a foreclosure was issued in this district, and upon the petition of the Plaintiff, an order was passed by the *Sudder Dewanny* Court at *Calcutta*, on the 9th of *December*, 1837, to try his case in this district; and it is not required by the Regulations that when mortgaged property is in two or three districts the foreclosure should be made in all the districts. By the order of the *Sudder* Court, therefore, there is no further need of inquiring into this point. The plea that the foreclosure was not made in the name of *Rae Kishen Chund*, the adopted son of *Ras Muni Dibiah*, and that the suit of Plaintiff cannot, therefore, be admitted, for which he has filed a copy of a decision of the Court of Appeal as a precedent, but it does not support the plea, for that case is not similar to this, especially as *Rae Bejay Kishen*, the vendor, gave a written permission to *Ras Muni Dibiah* to adopt a son, and to pay his debts by the sale of his property, which she has the power of doing; and she has not endeavoured to pay his debts, but adopted a son, which cannot impugn the sale made by her husband, and establish the right of the son to the property sold. It is evident that the order for a foreclosure was issued to *Ras Muni Dibiah* and her guardian, and notice was given to the Collector, and the Defendants made no objection to it; and by the written permission, *Ras Muni Dibiah* has the enjoyment of her husband's estate until the minor comes of age, especially as her name is entered in the Government and district records, and her husband's *Zemindary* has come under the Court of Wards. Moreover, the plaint states, that the adoption of *Rae Kishen Chund* was not known when the foreclosure was made. The order of foreclosure not being served in his

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name, therefore, cannot be an objection to this suit. The plea that Rs. 11,100 were not paid of the purchase-money in the Bill of Sale, and deducted as discount or excess of interest, is not worthy of credit, and no proof has been adduced of it. If it were true, the vendor in his lifetime, or *Ras Muni Dibiah* when the foreclosure was made, would have regularly informed the Judge of it, which was not done. It is proved that *Ras Muni Dibiah* presented a petition to the Collector, declaring that the lands, of the value of 37,000 rupees, now claimed, were mortgaged to the Plaintiff's father. For all these reasons the objections of the Defendant are inadmissible. By sec. 8, Reg. XVII. of 1806, and the Circular Order of the 13th of *July*, 1813, the Plaintiff has a right to the property mortgaged." It was, therefore, ordered that the Plaintiff be put in possession of half of *Sumskar Bhedurpoor*, &c., with mesne profits from the date of the completion of the foreclosure until the date of obtaining possession; with costs.

From this decree the Appellant appealed to the *Sudder Dewanny Adawlut* at *Calcutta*. The appeal came before Mr. *Charles Tucker*, who, on the 21st of *December*, 1839, pronounced his decree as follows:—"The grounds of the appeal, and the documents inserted in the decision of the Principal *Sudder Amin*, have been fully considered, but in my opinion there appears no ground to admit the pleas of appeal; for the plea of the Appellant, that gross errors have been committed in issuing the order for foreclosure under Reg. XVII. of 1806, is unfounded; and there is no proof that excess of interest was taken. The decision of the Principal *Sudder Amin*, therefore, appears to be very correct, and should be affirmed."

After an application for a review of judgment, on the ground that the Plaintiff had obtained the order to foreclose before the expiration of the mortgaged term, which was rejected, the Appellant brought the present appeal, which now came on for hearing.

Mr. *Turner*, Q. C., Mr. *Jackson*, and Mr. *Forsyth*, for the Appellant.

There are two grounds of objection to the order of foreclosure. First, the *Zemindary* of *Sumskar Bhedurpoor*, the mortgaged property in dispute, is under the jurisdiction of the Court of *Beerbhoom*, and not of the Court of *Moorshedabad*; consequently, the provisions of Bengal Reg. XVII. of 1806, sec. 8, have not been complied with, and the suit being wrongly instituted in the Court of *Moorshedabad*, that Court had no power to issue the order in question; which must be treated as a nullity, the institution of the suit depending, in the first instance, upon the observance of this section. Secondly, the order was not served on *Kishen Chund Rae*, the adopted son of the mortgagor, and his legal representative, as required by the Regulation. *Marshman's* "Guide to the Civil Law of the Presidency of Fort William," p. 614. The order is directed to the widow only, the tenant for life, and not the adopted son, the proper party, and was, therefore, inoperative by Reg. XVII. of 1806. Finally, the case ought to be remitted to *India* for a fresh trial, the Principal *Sudder Amin* having refused to summon witnesses tendered by the Appellant, and the benefit of their testimony was thereby lost to the Appellant. *Jeswunt Sing-jee* v. *Jet Sing-jee Ubby Sing* (*a*). *Macpherson* "On Civil Procedure," pp. 270, 271.

(*a*) 2 Moore's Ind. App. Cases, 424.

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Mr. *Wigram*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent.

The mortgaged property being situated in two districts, the proceedings taken to obtain the decree of foreclosure in the *Moorshedabad* Civil Court, where the estates were partly situate, were regular, and in compliance with Bengal Reg. XVII. sec. 8, of 1806, as it was not the intention of the Regulation, that, where mortgaged property is situated in two districts, orders for foreclosure should be made in both, the sole intention of that section being to prevent the conditional sale from becoming absolute till the seller shall have received notice from the Court that the purchaser has demanded payment. *Marshman's* "Guide to the Civil Law of the Presidency of Fort William," p. 614.

Lord LANGDALE:

This appeal is presented from a decree of the *Sudder Dewanny* Court of *Calcutta*, of the 21st of *December*, 1839, that decree having affirmed a decision of the Principal *Sudder Amin* of the Civil Court of *Moorshedabad*, and this was done in a suit instituted by the Respondent, as Plaintiff, against the Appellant and others, which suit was founded upon a certain order of foreclosure, which was made in the Court of *Moorshedabad*, upon a mortgage deed set forth in these papers.

It is alleged, that the order of foreclosure was irregular, and ought not to be held operative, on the ground, that it was granted contrary to section 8 of Regulation XVII. of 1806; of which it is only necessary to state so much, as directs, that a petition for such an order is to be presented to the Judge of the *Zillah*,

or City, in which the mortgaged lands or other property may be situated, and it provides, that the Judge, on receiving the application, should cause the mortgagor, or his legal representative, to be furnished with a copy of it.

It was alleged here, that the land was not situated in the district of the Court where the order was made, and that a copy of the Petition was not served on the proper party.

Now, with respect to the first objection, we observe, that the mortgage deed expressly describes the land to be in the district of *Moorshedabad*. "I have possessed and enjoyed my paternal *talook* in the district of *Moorshedabad*, the *Pergunna* of *Shumskar Bhedurpoor*, &c., without the participation of any other."

That was undoubtedly, therefore, the Court in which it might, *primâ facie*, be supposed an application for such an order ought to be made.

Now, in the plaint, it appears from the statements, that the land is situate within the *Moorshedabad* Collectorate; but in the answer of the Collector, it is expressly stated, that the order for foreclosure issued by the Court to *Ras Muni Dibiah*, after the expiration of the term of the conventional sale, was irregular, as the estate of *Sumskar Bhedurpoor* was under the jurisdiction of the Civil Court of *Beerbhoom*; and that the order for the foreclosure issued by the Court of that district, was contrary to the provisions of section 8, Reg. XVII., of 1806, which had not been at all observed.

To that it was replied, that the land in question was within the two districts, and that being the case, the order might be obtained in either of them.

Now, it does not appear that any rejoinder was filed to that replication, which was the allegation on which the case proceeded.

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It then appears that there was an application made to the *Sudder* Court. It certainly is somewhat singular that no description of the circumstances is given under which that application was made to the Court, but in consequence of that application, an order was made, by which the question which arose in this cause, was to be tried in the Court of *Moorshedabad*. It related to the cause, it did not relate to the order of foreclosure. But what is there to show in the whole course of these proceedings, that these lands were not situated partly in one, and partly in the other district; and what is there to show in the course of the proceedings, that if that were the case, an order made in the Court of either district would not be a proper order?

We think, that there is nothing in this case to show the order was not made in a proper Court.

The next objection made to this order, is, that there was no service on the proper party. Now, the parties who are interested in this case, in what is called here, the permission to adopt, by which an interest is given to the wife, for her life, with a power to appoint an heir, which heir, when appointed, would have a right to the inheritance, are the Appellant and the adopted son, *Rae Kishen Chund*. The adopted son being a minor, under the guardianship of the widow of the mortgagor, we are of opinion, the services upon this lady, the guardian, was quite sufficient.

The only other objection, which was made to the decree, not to the order, is, that there was a refusal to examine witnesses, the examination having been prayed for at the time the hearing was going on. Now, certainly, it does seem as extravagant an application as ever was made to any Court, to ask, in the midst of the hearing, that there should be a permission to

examine witnesses, those witnesses having been ascertained long before; *subpœnas* having been issued to compel them to come in and give their evidence; those *subpœnas* not having been served, because they were then about to leave the place, but they might have been served immediately afterwards, and certainly it is not an application that ought to have been made to the Court. Their Lordships, therefore, are of opinion, that that is no ground for this appeal, and the appeal must, consequently, be dismissed with costs.

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MUSSUMAT IMAM BANDI and WAJID ALI KHAN - - - - } *Appellants*,

AND

HURGOVIND GHOSE - - - *Respondent*.*

On Appeal from the Sudder Dewanny Adawlut at Bengal.

28th, 29th, & 30th June, 1848.

Alluvial lands which are gradually gained from the river, belong, by way of accretion, to the lands of the adjoining proprietor.

THE question in this appeal was one of disputed boundary; whether certain lands lying to the north of the City of *Patna*, in *Behar*, formed part of the *mouza*, or village, called *Akbarpoor*, belonging to the Appellants, or whether they were part of the Respondent's *mouza*, called *Raipoor Hussun*.

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

An order, giving possession of lands, made by the *Foujdarry* (Police Magistrate's) Court, upon a charge of a breach of the peace, coming before the Magistrate, is not a determination respecting the rights to such lands.

Lands having been submerged, by a change of the course of the river *Ganges*, after several years, reappeared. Upon a disputed question of right to such lands, by two adjoining proprietors, each claiming the lands to be part of his *mouza*: the *Sudder* Court held the Plaintiff's claim to be barred,

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The facts of the case, the nature of the evidence produced, and the arguments raised on the appeal, are fully stated in the judgment.

The appeal was argued by

Mr. *Turner*, Q. C., Mr. *Jackson*, and Mr. *Forsyth*, for the Appellants.

Mr. *Wigram*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent.

The following Regulations and authorities were referred to, and commented upon, in the course of the argument:

Upon the question of alluvial lands, formed by accretion, belonging to the owner of the adjoining lands, Ben. Reg. XI. of 1822, sec. 4. *Zeeboo Nisa* v. *Pursun Rai* (*a*); and

On the question of the operation of Regulations of Limitation, Ben. Reg. III. of 1793, sec. 14; and Reg. IV. of 1805, sec. 3, cl. 1.

Judgment was delivered, as follows, by

The Right Hon. T. PEMBERTON LEIGH:

7th July, 1848.

The suit, in this case, is brought to recover certain lands containing something more than 612 *beegas*, lying near the City of *Patna*. It is claimed by the Appellants as part of a *mouza* belonging to them, called *Akbarpoor*.

The Respondent alleges, that it is part of a *mouza* called *Raipoor Hussun*, which belongs to him, but he

(*a*) 3 Ben. Sud. Dew. Rep. 316.

first, by the *Bengal* Regulations of Limitation, from lapse of time; and secondly, that the lands were alluvial and attached to the *mouza* of the Defendant. Such Decree, upon appeal, reversed, the Judicial Committee holding—

First, that the question of Limitation not having been put in issue by the pleadings, could not be allowed to operate upon the case; and

Secondly, that the Court had mistaken the question, in supposing it one of alluvion, the point at issue being one of boundary only, and that the Plaintiff had made out his title to possession.

insists, that however this may be, he is in possession, and that it lies upon the Appellants to make out their title.

This is no doubt true, and the whole question, in the case, is, merely, is, or not, the land in dispute, shown to be part of the *mouza Akbarpoor*?

Upon a question of this description, very great weight would, at first sight, appear to be due to the judgment of the Court below; there are circumstances, however, here, which go far to destroy the authority of the judgment.

The Judge of the Provincial Court was in favour of the Appellants. In the *Sudder* Court, the Judges were divided in opinion, and though three against one concurred in the decision, one of the three decided upon a point which was repudiated by the other two, and these two unfortunately mistook the nature of the question which they had to try. They conceived that the question was as to alluvial land, in the sense of land gradually gained from the river, and which having no other owner, would belong by way of accretion to the lands of the adjoining proprietor. Whereas the ownership of the adjoining lands, though essential in the consideration of a title founded on accretion, was of little, or no value, in the issue actually joined between these parties.

To consider then the real question. Some evidence has been received in the Court below, which, by the rules of English law, would not have been admissible here, and some has been given in a different form from that which those rules would have rendered necessary; but we are dealing with law as administered in Indian Courts by unprofessional Judges, and we must look at the evidence which they have re-

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ceived, and consider the effect which it ought to have produced.

Some points seem to be agreed upon between the parties. The whole of the district adjoining the land in dispute, as well as that land itself, is flat, and is very liable to be covered, or washed away, by the waters of the *Ganges*, which river frequently changes its channel. The land in dispute was inundated about the year 1787; it remained covered with water till about 1801; it then became partially dry till, in the year 1814, it was again inundated. After this period it once again re-appeared above the surface of the water, and by the year 1820, had become very valuable land.

The question then, is, to whom did this land belong before the inundation. Whoever was the owner then, remained the owner while it was covered with water, and after it became dry.

The tract in dispute, together with something more than 187 *beegas*, already recovered by the Appellants, is alleged by them, to form the *mouza* of *Akbarpoor*. They allege it to be bounded on the west by the *Koocha* of *Oodha Das*, on the east by the *Moocha* of *Kinoo*, on the south by *Mehrampoor*, *Mooradpoor* and *Afzalpoor*, and on the north by *Raipoor Hussun*. This description places *Akbarpoor* to the south of the *Ganges*.

The Respondent alleges, that the whole of the land in dispute, is part of *Raipoor Hussun*, and that, in fact, the whole of the Appellants' *talook* is to the north of the *Ganges*.

The Appellants proved their title, by a grant by the Emperor *Arangzeb*, in the year 1679, to their ancestor, of the *talook* of *Subulpoor*, which is there described as containing 6,756 *beegas*, 12 *biswas*, and

to consist of 11 *mouzas*, four under the name of *Subulpoor*, and one named *Akbarpoor*. This *talook* was to be held by *Maddad-i-mash*, or free from tribute, and as the same exemption from payment of rent to the Government continued after the country came under the dominion of the East India Company, they had a material interest in having the extent of these lands clearly ascertained, and preserved distinct from the lands liable to assessment.

The particular extent of *Akbarpoor* does not appear by the original grant; but in a map of 1779, it is stated to contain 800 *beegas*, or about 1,600 English acres.

We have evidence, then, of the existence of the *mouzas* of *Akbarpoor*, and of its extent. The question is, where was it situated.

A number of witnesses, produced by the Appellants, state, that its site agrees with the boundaries alleged by them.

An equal, or perhaps larger number of witnesses produced by the Respondent, swear, that those boundaries include not *Akbarpoor*, but *Raipoor Hussun*.

In this contradiction of oral testimony, which occurs in almost every Indian case, we must look to the documentary evidence, in order to see on which side the truth lies; and that appears to us, to leave no doubt upon the question.

The first document produced by the Appellants, purports to be a measurement, made the year 1784, in a dispute between the owners of the *talook* of *Subulpoor* and the owner of some adjoining lands. In this document the *mouza* of *Akbarpoor* is stated to contain 800 *beegas*, and to extend east and west from *Pahleza* to *Kootabpoor*, north and south from *Mehrampoor* to *Raipoor Hussun*.

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These boundaries, according to all the maps, would include the property in dispute.

It is said, however, that no account is given of this document in the evidence; that it appears from a note of the translator to be full of inaccuracies, and that no weight was given to it by any of the Judges below. The other evidence in the case makes it unnecessary to place any reliance on this document, though there appears no reason to suspect that it is not genuine.

The next document produced, is a measurement made about the same period, and which seems to have been prepared for the purpose of distinguishing the lands which were exempt from tribute to the Government. It is very minute and particular, and there is no impeachment of its accuracy. The 19th article describes *Akbarpoor*, *Dalchili* of *Subulpoor*, as extending from the south opposite to *Bara Bungla* to *Raipoor* on the north, and on the north-east from the limits of *Koòtabpoor*, opposite to the *ghat* of *Kinoo*, to the limits of *Zahidpoor*.

Upon examination of the maps it will be found that this description, though in different language, quite agrees with the preceding document.

We have next a report made by a public officer in the year 1787, upon a question of boundaries, which had arisen between the proprietor of *Subulpoor* and the proprietors of *Govindpoor*, about the time when the inundation begun. In this report the boundary of *Akburpoor*, on the west, is stated to extend to the *Koocha* of *Oodha Das*, and on the east to the *ghat* of *Kinoo*; and it is described as lying south-west of *Raipoor*.

We have, then, these documents all describing the

same land by boundaries, in substance the same, although the difference of the points referred to, and of the language used in the several descriptions, show them to have been the result of independent surveys.

Upon the main point, however, which, in truth, is decisive of the case, that *Akbarpoor* lay to the south of *Raipoor*, and not to the north, there is further evidence.

We have, first, a survey, made by a Government officer in the year 1810, on the alluvial lands of *Afzalpoor*. In this, *Akbarpoor* is stated to be on the south of *Raipoor*, and between *Raipoor* and *Afzalpoor*.

We have then a map prepared by *Moonna Ram*, in 1812, in a dispute as to boundaries between persons having no connection with this suit, and here again *Akbarpoor* is placed to the south of *Raipoor*.

This is the material documentary evidence produced by the Appellants, and against it none whatever is offered by the Respondent. He does not even produce the description contained in his own title-deed, alleging, that for some reason the bill of sale to him was not forthcoming. He relies, however, upon certain suits which have taken place with respect to *Akbarpoor*, and upon evidence which has been given, and decisions which have been pronounced in those suits.

They appear to have been of two distinct classes. First, between the Appellants, or their ancestors, and the Government; and, secondly, between those parties and the Respondent.

As the parties to those suits whom the Appellants represent, varied from time to time, but their interests

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and title are now vested in the Appellants, we shall speak of the parties under the general term of the Appellants, in order to avoid the detail which would be necessary to explain the various changes and transmission of interests.

We will first consider the controversy with the Government.

Soon after the time when the district now insisted to form *Akbarpoor* became dry, a part of it, marked No. 18 on the map produced, marked F, was claimed and taken possession of by the Government as being alluvial, and being subject to revenue.

The Appellants claiming it as part of *Subulpoor*, an inquiry was directed by the Government, and the Collector, on the 13th of *December*, 1828, reported in favour of the Appellants, finding that the land in question was part of *Akbarpoor*, and adopting the boundaries of *Akbarpoor*, stated in the documents already referred to.

The Government was dissatisfied with this decision, and brought the case before the Court of Special Commission of *Patna*, who, on the 15th of *September*, 1829, confirmed the decision of the Collector, and an order was given to the *Amin* to ascertain the boundaries of *Akbarpoor*, and the portion of it in possession of the Government.

In the execution of this order it was found that a large portion of the alleged district of *Akbarpoor* was in possession of the Respondent, *Hurgovind Ghose*, who objected to having it measured ; and, accordingly, that portion only which was in possession of the Government, was measured, and found to amount to something more than 187 *beegas*. The remainder of the land amounting to rather more than 612 *beegas*,

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was stated in the report to be in the possession of 1818 *Hurgovind Ghose*.

In pursuance of these proceedings, the Appellants, or their ancestors, were put in possession of 187 *beegas*, and have since remained in possession.

It is very truly said, on behalf of the Respondent, that he was no party to these proceedings, and cannot be bound by them; but then it was contended, at the bar, that the land thus given up to the Appellants will satisfy the description of *Akbarpoor*, contained in the preceding documents. The quantity of land contained in *Akbarpoor*, and of the eastern boundaries, were both forgotten. Neither of these important conditions is satisfied, by limiting the Appellants rights in the manner proposed.

We now come to the disputes between the Appellants and the Respondent.

It seems that in the year 1813, both *Raipoor Hussun* and *Subulpoor*, having been devastated by the *Ganges*, a portion of land, which had become dry, was claimed by the servants of the Appellants as part of *Subulpoor*, and by the servants of the Respondent as part of *Raipoor*, and quarrels leading to a breach of peace took place between them. In consequence of this, the matter came before the *Foujdarry* Court, which on the 5th of *May*, 1813, after observing very justly, that the rights of the parties could only be decided in the Civil Court, ordered that, in the meantime the Appellants should be confined to the north bank of the *Ganges*, and the Respondent to the south.

It is obvious, that this decision involved no determination at all as to the right of boundaries.

Accordingly, for the purpose of settling these boundaries, a suit was instituted in the Civil Court of

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Patna; and on the 18th *February*, 1816, an order was made, which, if taken strictly, would exclude both parties from the land in dispute, inasmuch as it fixed the southern limits of *Raipoor Hussun* in a manner which would exclude it, and confines *Subulpoor* to the north bank of the *Ganges*, but the boundaries as they affect the land now in dispute were not in question, and the order, therefore, may be laid out of the case.

In 1819, another suit was instituted by the Appellants against the Respondent, in which the controversy was, as to the boundaries of *Raipoor* and *Subulpoor* in lands lying to the north of the first *Sota*. This suit is relied on by the Respondent, for two reasons: First, because, in the course of it, a map was prepared by *Hookum Chund*, in which the land, now in dispute, is described as part of *Raipoor Hussun*; and secondly, because, as it is said, if that land was not embraced in that suit, it might have been embraced in it, and, therefore, it is evidence to show that the Plaintiff did not consider this land as belonging to him.

That this suit did not embrace the lands in question is perfectly clear, and *Hookum Chund* being examined as a witness, states, that when the map in question was prepared, he described the land now in dispute as part of *Raipoor Hussun*, upon the statement of the Respondent's agent, the Appellants or their agents not attending; the question being immaterial, inasmuch as the rights of *Akbarpoor* were to be determined in another suit to be presently mentioned. These circumstances appear to us to destroy the weight of the first argument. As to the second argument, it is answered by the fact, that almost immediately after the institution of the suit just mentioned, viz., in 1820, a

suit was instituted by the Appellants against the Respondent and several other parties, claiming the lands in question as part of *Akbarpoor*, but not setting forth with sufficient distinctness, the lands which he claimed, or the quantities which he demanded from the several Defendants.

Upon this ground his suit was dismissed in 1827, and in 1830 the present suit was instituted against the Respondent.

It is not necessary to go through the several proceedings which have taken place in it. The evidence has already been referred to, and after the most careful examination and inquiry, the Judge of the *Patna* Court, Sir *James Harrington*, who resided close to the disputed land, which immediately adjoins the Court-house, having the opportunity of examining the site, and the different fixed points, and of applying the description from the documents and the oral testimony to the lands to which they refer, ultimately came to a decision in favour of the Appellants, and expressed his opinion, in a well-considered and a well-reasoned judgment, on the 14th *March*, 1834.

From this judgment there was an appeal to the *Sudder* Court, when unfortunately the judgment was reversed, upon the grounds which we have already adverted to, which destroy all the authority of the final decree.

We can entertain no doubt, that the conclusion to which Sir *James Harrington* came, on the evidence, was the right conclusion, and that the Court ought to have found that the land in dispute was shown to be part of *Akbarpoor*.

Two of the Judges relied on another objection to the Appellants' claim, viz., that it was barred by length of

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time. It is very doubtful upon the facts as they now appear, whether such an objection, if it had been raised by the Respondent, could have prevailed, but it is sufficient to say that the objection was not raised, and that the Appellants, therefore, had no opportunity of meeting it, by evidence.

Upon the whole, we shall have no difficulty in coming to a conclusion, that the Decree complained of, ought to be reversed, and that the Appellants ought to be put in possession of the land in dispute, and that they ought to be paid by the Respondent, the amount of the annual value of the land from the commencement of the institution of the suit, in 1830, together with the costs in the Court below, and that of this appeal each party should bear their own costs, and we shall humbly report our opinion to Her Majesty, accordingly.

HURADHUN MOOKURJIA - - *Appellant*,

AND

MUTHORANATH MOOKURJIA and others *Respondents*.*

On Appeal from the Sudder Dewanny Adawlut at Bengal.

13th, 14th & 15th Feb. 1849.

THIS was a suit for possession of the real and personal estate of one *Ghunsam Mookurjia*, deceased.

Adoption may be made, either by a man in his lifetime, or by his widow, after his death, under a power conferred on her for that purpose by her husband.

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillor,—*Assessor*,—Sir E. Ryan, Knt.

Where there is conflicting evidence upon the fact of an adoption, much

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The Appellant, who was Plaintiff in the suit, and at that time a minor, claimed the estates, as the adopted son of the deceased. The case of the Appellant was, that *Ghunsam Mookurjia*, being old and without possibility of issue, had executed an *anumati pattra*, authorising his second wife to adopt a son; but had, in consequence of sudden illness, superseded that authority by adopting him, the Appellant, as his son, and as such he was entitled to the property in question. The Respondents, *Muthoranath Mookurjia*, *Nubkishen Mookurjia*, and *Ram Chunder Mookurjia*, the sons and heirs of *Goluk Chunder Mookurjia*, deceased, one of the Defendants, denied the fact of such adoption, and set up a title to the whole of the property, under a *hibbanama*, or deed of gift, made in *Goluk Chunder Mookurjia's* favour, by the deceased, *Ghunsam Mookurjia*, and also claimed the estates, as his undivided brother, under a joint partnership existing between them, under which title *Goluk Chunder Mookurjia* had obtained possession of the property in dispute.

Ghunsam Mookurjia was the eldest of five brothers, viz. *Gobind Ram Mookurjia*, *Goluk Chunder Mookurjia*, *Rashanund Mookurjia*, *Unoop Narain Mookurjia*, and

will depend upon the probabilities of the case, to be collected from facts as to which both parties are agreed.

As, in the case of a childless Hindoo, advanced in years, where it was in the highest degree improbable that he could have any children by his wives, and he had adopted a boy, in despair of having issue, who died in his adoptive father's lifetime, and the fact of his religious tenets, by which his salvation depended upon his leaving a son to perform his funeral oblations,—

Held to be strong probabilities in favour of such an adoption.

The evidence of witnesses to the fact of a parol adoption, without deed, was contradictory, the Provincial and *Sudder* Courts in *India*, held, that a claimant to the succession, as adopted son, had not established, by creditable testimony, the fact of such adoption. Upon appeal, such Decrees reversed; the Court holding, that the presumption, in the circumstances, was in favour of adoption, and that the evidence was sufficient to establish the claimant's title.

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a half-brother, *Beer Eshur Mookurjia*, who, together, constituted an undivided Hindoo family. In the year 1792, a separation of the family took place, and in the year 1817, this arrangement was further carried out by a partition; and a division of the joint property was made between them.

Ghunsam Mookurjia had two wives, but having no child by either, and being advanced in years, and it being improbable that he would have issue by his wives, he adopted, as his son, *Banee Madho*, the son of his brother, *Goluk Chunder Mookurjia*. *Banee Madho* died in the year 1824, in the lifetime of his adoptive father.

In consequence of his death, *Ghunsam Mookurjia* executed a deed, called an *anumati pattra*, empowering his second wife to adopt a son or sons. This power was never exercised.

On the 30th of *January*, 1825, *Ghunsam Mookurjia* died, leaving two widows, who afterwards became *suttees*, and burnt themselves with the body of their husband. The evidence was conflicting, as to the fact of the Appellant, or *Goluk Chunder Mookurjia*, performing the ceremonies of *Kriya*, and *Karma*, and *Sradha*, for the deceased *Ghunsam* and his widows.

Goluk Chunder Mookurjia, who was already in possession of all the deceased's property, under an order by the Magistrate of the district, continued in possession.

Upon the death of *Ghunsam Mookurjia*, a claim was set up by *Juggut Chunder Mookurjia* and others, as the executors named in a testamentary paper, called a *Wusseyutnama*, whereby they were appointed the guardians of the Appellant, on behalf of the Appellant, then a minor, to the property, as the adopted son of the deceased.

The Right Hon. Dr. LUSHINGTON:

12th Feb. 1850.

This is an appeal from the *Sudder Dewanny* Court of *Bengal*, and the subject-matter of the suit, is the mesne profits of an estate in the *pergunna Ookrah*, claimed by the present Respondent, in whose favour both the *Zillah* Court of *Nuddea* and the *Sudder* Court pronounced decrees.

In the course of these proceedings, the Appellant, who was the Defendant in the Court below, pleaded an agreement contained in an instrument bearing date the 12th of *February*, 1819, and the whole case turned upon the question, whether this agreement was a genuine and valid deed, or, as contended by the Respondent, a forged instrument.

Both the Courts below have decided against the validity of the instrument; a fact which, considering the advantages the Judges in *India* generally possess, of forming a correct opinion of the probability of the transaction, and in some cases of the credit due to the witnesses, affords a strong presumption in favour of the correctness of their decisions, but does not, and ought not, to relieve this, the Court of last resort, from the duty of examining the whole evidence, and forming for itself an opinion upon the whole case.

We proceed then to a consideration of the evidence, and an investigation of the reasons assigned by the Judges in the Courts below for their decision; but before commencing this task, a very brief statement of the facts of the case will be necessary.

The Board of Revenue, on the 29th of *December*, 1813, sold a property situate in *zillah Nuddea*, for

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arrears of revenue. That property consisted of 271 *mouzas*, of which 62, constituted *Dihi Bydnathpore*, and 18, *turuf Sookhsagur*. By two purchases the Appellant became the proprietor of one half of this property, the other half was owned by persons of the name of *Bundojia*. For some time, joint possession was held of the whole estate, excepting *Dihi Bydnathpore* and *turuff Sookhsagur*. These two districts the occupants held adversely, and against them suits to recover possession were brought by the purchasers.

On the 8th of *February*, 1819, these suits being still undetermined, the Appellant, who held an eight-*ana* share, sold a two-*ana* share to the Respondent. These facts are common to both parties; but with respect to the payment of the purchase-money, there is much dispute: it will be necessary hereafter to advert to this circumstance; but it is more convenient, at present, to proceed with a statement of the facts which do not appear to be disputed.

On the 23rd of *November*, 1819, the Appellant and his co-owners obtained possession of *Dihi Bydnathpore*, under decree of the Court. On the 27th of *June*, 1822, the property was divided under the orders of the Collector, and the Respondent was awarded $7\frac{3}{4}$ *mouzas* in *Dihi Bydnathpore*.

In *July*, 1826, the Appellant sold the whole of his share of this property, excepting his share in *turuf Sookhsagur*, and $3\frac{1}{2}$ villages in another *turuf*, to a Mr. *Harris*. With Mr. *Harris* the Respondent had disputed as to his share of this property. A litigation followed, which terminated by compromise on the 3rd of *April*, 1832.

The plaint in the present suit was filed on the 8th of *July*, 1833. By that plaint, the Respondent demands Rs. 49,999, as mesne profits, from the 19th of *January*, 1819, to the 11th of *April*, 1826, interest included. It is certainly somewhat singular that such a demand as this, if well founded, should have been so long delayed; no less than seven years having elapsed from the period when the claim ended, before the commencement of a suit to recover what is alleged to have been due yearly, at least, if not half-yearly, for seven successive years from 1819. This is surely a circumstance which requires a very satisfactory explanation; for necessarily, after the lapse of so many years, there must be great difficulty in ascertaining the truth of such a demand, not to mention the presumption against it, for non-claim for so long a time. It appears, however, from the plaint, and also from other proceedings in this cause, that the Respondent in 1824, instituted a suit against the Appellant, in which he claimed mesne profits between the 12th of *April*, 1819, and the 14th of *December*, 1823, of this same *Dihi Bydnathpore*.

In defence to this suit, the Defendant pleaded two agreements; one an agreement dated the 12th of *February*, 1819, and the other an agreement dated the 15th of *May*, 1822; the Respondent, in reply, admitted the execution of this latter agreement, and denied the former altogether.

Various documents are produced; amongst others, the two agreements and the signatures attached to each, were compared with each other; but from this comparison no result was obtained. No evidence as to the execution of the disputed agreement, was, so far as appears, produced.

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The decree of the Court, bearing date the 10th of *January*, 1826, was to this effect, that the Respondent should be non-suited, with leave to correct his plaint, and bring a fresh suit.

From this period, *January*, 1826, to *April*, 1833, no proceedings were adopted by the Respondent to recover any part of these mesne profits. He states himself (for another purpose, indeed,) to have been a man of wealth and substance; he enters into litigation with Mr. *Harris*, who purchased from the Appellant, but he never, till *April*, 1833, attempts to recover either the mesne profits, due as alleged at the commencement of the suit of 1824, nor those subsequently accruing, till 1826, when Mr. *Harris* made his purchase.

There is nothing in the course of these proceedings that we can discover, which can in any way satisfactorily account for this delay, if the Respondent had really and truly a *bonâ fide* claim to these mesne profits. He was warned by the Judge in 1826, of the errors contained in his plaint, according to the conception of the Judge, namely, that being in possession of the property, he claimed for the mesne profits; whether or not that was a real error, we need not decide; but this is clear, that he was at liberty to bring a new trial, and to shape his plaint as he might be advised.

But this is not all. He was distinctly apprized of the nature of the main defence to his action, namely, that his claim was precluded by the agreement of the 12th of *February*; that the Judge expressed his opinion that the Appellant in some part of his defence was attempting to deceive the Court, and yet for seven years the Appellant does nothing

Surely it affords no weak presumption against a claim so long delayed, that the Respondent, with full knowledge of all the facts, and the nature of the defence, should so long neglect his own interest, with ample means of protecting it.

But to resume the narrative. The answer to this plaint of 1833, is substantially, though a great deal of argument is mixed up with the real defence, that the Respondent executed, on the 12th of *February*, 1819, the deed produced in the former suit, and that by the tenor of that deed, the Respondent is precluded from maintaining this suit.

It will be expedient to state concisely the contents of that agreement, and then to consider whether such contents are consistent with the proved circumstances of the case, and, whether the execution of such a deed is on the whole probable or improbable.

This deed is in the name of the Respondent, addressed to the Appellant. It states, that a Bill of Sale, and a receipt of the amount value, had been executed by the Appellant; that the Respondent, awaiting the entry of his name in the Collectorate records, had not paid the money, but had executed a Bond for it; that five days after recording the name in the records, the money should be paid.

The first part of this recital, so far as relates to the Bill of Sale, is admitted to be true; but in this agreement, the receipt is said to bear even date with the Bill of Sale, viz., *February* the 8th; whereas on inspecting it, the date is the same as that of the agreement itself, namely, the 12th of *February*. This circumstance naturally gives rise to some suspicion, nor is that suspicion cleared away by the explanation offered, that the receipt was written on the 8th, but

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dated afterwards on the 12th, when the Bond for payment of the purchase-money is said to have been given. The agreement then states that the purchase-money was not paid, but that a Bond was given for it, conditioned for payment of the money five days after the Respondent's name should be recorded in the Collectorate; the Bond was, during the interval, not to carry interest, and no claim was to be made for principal during that time. Though at first sight it may appear strange, that instead of actual payment, a Bond should be taken, yet there are circumstances which tend to reconcile the arrangement with probability, which is the only reason for examining it, as no dissent exists as to the payment itself, whensoever or howsoever made.

The vendor himself was not in possession of a part of the property purported to be sold. Suits at his instance were depending for the recovery of that property, and the results of such suits must in some degree have been uncertain. It was impossible, therefore, for the vendor to give possession of all the property purported to be sold, and, consequently, not improbable that the purchaser should decline to pay the purchase-money until put in possession. The Respondent avers, that he paid the money at the time, and that the Bill of Sale and receipt were duly registered, and so they appear to have been; but surely it was, or ought to have been (had not his own delay prevented it), in the power of the Respondent to have proved the payment. The sum purported to be paid, is Rs. 77,500 in cash, current coin, &c., before three witnesses.

The sum total is between £7,000, and £8,000; could it be a matter of difficulty to have proved so large a payment

in money, and was it not a most important fact in the cause, as it would have falsified a very material averment in this most important instrument? Yet no attempt is made to establish a fact of this importance. We cannot, therefore, say, that this statement in the agreement is wholly improbable, and certainly it is not refuted by the Respondent. It is right, however, on the other hand to observe, that there is no proof of the execution of this alleged Bond, nor of any payment made under it, according to the agreement; omissions which justly give rise to some suspicion.

There is nothing contrary to justice in the provision contained in the agreement, that during the period before the entry of the purchaser's name in the books of the Collectorate, no interest should run upon the Bond; and on the other hand, no part of the profits be payable to the Respondent. The agreement then provides, that possession shall not be given to the Respondent, of *Dihi Bydnathpore*, until, in the event of the pending suit terminating favourably to the owners of the property, that part of the estate lying in *Dihi Bydnathpore* had been partitioned off, and possession given; that in the meantime, the purchaser should pay the Government revenue, but should have no claim to the profits; the vendor, the present Appellant, paying the embankment and other expenses belonging to the *pergunna*, and also the costs of the pending suits. If the suit should not be successful, then the rents collected at the joint management office are to be applied to pay the expenses.

It was contended, that this arrangement was so unjust and inequitable, so injurious to the interests of the Respondent, that the execution of such an instrument by him was grossly improbable, and seeing the Judges

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of the *Zillah* and *Sudder Adawlut* were of that opinion; but it does not appear to us, that the conditions contained in this instrument are plainly so absolutely unjust, as to tend to the conclusion, that on that account alone, the deed should be considered a forgery. Whether those conditions were unjust or not, depends on many facts, of which we have no evidence or means of judging; on the result of contingencies, the probability of which, it is impossible for us to measure; and even the Courts below, though possessed of local knowledge, could not have adequate legitimate means to accomplish such a task.

We do not think it necessary to follow in detail the remaining contents of this instrument: an arrangement somewhat similar is made as to *Sookhsagur;* but this suit has no reference to that property.

It was urged against the validity of this agreement deed, that it had not been registered; and though it does not appear that registration was essential to confer upon it legal force, yet certainly the absence of registration is a circumstance for consideration. The deed of May, 1822, was not registered also.

It is now necessary to consider the evidence to the execution of this agreement deed, which deed, it must be remembered, was deposited in Court in the suit of 1824. There are five attesting witnesses. The first witness who speaks to the deed, is *Nushee Ram Ghose*, and his name appears as an attesting witness to the agreement of *February* the 12th; and if these papers are correct, he was produced by the Plaintiff, the Respondent. He deposes to the execution of the agreement and identifies it. It is very difficult to say, that this witness, so produced, is not entitled to any credit; but no observation is made by either of the Judges upon his

testimony. We are not able to concur with the Judge in the *Zillah*, that the circumstances to which he refers, destroy the credit of the witnesses; we cannot forget that they are examined seventeen years after the date of the instrument. *Nubeen Chunder*, another attesting witness, also proves the execution and identity of the instrument; so also *Ram Koonder Dey*; and their testimony is supported by the evidence of *Kounla Kanth* and *Ram Mohun*.

It is quite true, that such is the lamentable disregard of truth prevailing amongst the native inhabitants of *Hindostan*, that all oral evidence is necessarily received with great suspicion, and when opposed by the strong improbability of the transaction to which they depose, or weakened by the mode in which they speak, it may be of little avail; but we must be careful not to carry this caution to an extreme length, nor utterly to discard oral evidence, merely because it is oral, and unless the impeaching and discrediting circumstances are clearly found to exist. It would be very dangerous to exercise the judicial function, as if no credit could necessarily be given to witnesses, deposing *vivâ voce*, how necessary however it may be always to sift such evidence with great minuteness and care. It is a remarkable fact, in this case, that the existence of an agreement, bearing date *February* 12th, 1819, is admitted. There is produced in this cause, a deed indisputed, bearing date *May* 15th, 1822, consequently, long before the first suit was commenced, which expressly recognized an agreement deed, dated *February* 12th, 1819. It is said, that there was a deed of that date, but that it was of a different tenor; of this averment, we do not find the slightest proof; there is no evidence of any

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other deed of that date. This defence was not, so far as appears, set up in the former suit of 1824, and surely the presumption in the absence of all proof to the contrary, is, that this deed of 1822 referred to the deed of *February* 12th, 1819, produced in this cause, and produced as early as 1824, when it was not even alleged, that there was another deed of the same date, of a different tenor. Under these circumstances, we consider, that the agreement of 1822 affords a strong confirmation of the deed of *February* 12th, produced by the Appellant. There is another observation made by the Judge of the *Zillah* Court, which we think should be adverted to. The Judge argues, that the non-production of this deed in a suit as to *Sookhsagur*, though it was called for, is an argument against the validity of the deed. We do not sufficiently know the circumstances of that suit, to enable us to form any accurate opinion, as to the necessity of producing it; but as this very deed, long before that suit commenced, was deposited in Court in a prior suit, and placed among its records, it is difficult to conclude, as it was accessible to both parties, that the non-production in that cause, is a proof of its being a forgery; besides, the deed of 1819 was no defence to that claim.

Among those papers are to be found numerous extracts from the proceedings in various other suits relating to some parts of the estate originally sold in 1813. We do not think that any conclusion as to the main issue in this case can be safely drawn from those extracts. It is very difficult from such extracts only, to understand accurately such a series of complicated litigation, and still more difficult and dangerous to rely upon isolated parts of former proceedings

between different parties and for different purposes, as applicable to the question in the case.

We do not find that the Judges in the Courts below imported them into their reasons, for the conclusions to which they arrived, except for the purpose of fixing the amount of mesne profits; we, therefore, do not deem it necessary to notice them more particularly.

On the whole, we are of opinion, that the agreement of the 12th of *February*, 1819, is established by the evidence produced, and that it must be carried into effect; consequently, the claim for mesne profits of *Dihi Bynathpore* cannot be maintained for the period antecedent to possession on the *Dihi*, being completely partitioned off; and we do not find that it was completely partitioned off, and possession taken by the Respondent, at any time during the period for which mesne profits are claimed by this action.

We are, therefore, under the necessity of reversing the judgment of the Court below, and of the two inferior Courts, and pronouncing that the Respondent has failed in establishing his claim.

Lord *Brougham*:—The other appeal, relating to *turuf Sookhsagur*, will follow the same fate: the judgment appealed from in that case must also be reversed.

RAJA OODIT PURKASH SING - - *Appellant,*

AND

HENRY MARTINDELL and WILLIAM STACY - - - - - } *Respondents.**

On Appeal from the Sudder Dewanny Court at Bengal.

3rd July, 1849.

A deed of mortgage, and conditional sale, contained a covenant for possession by the mortagee during the mortgage term. Possession was withheld, though the mortgagor received the mortgage money.

Held, that an action would lie by the mortgagee against the mortgagor for recovery of the principal and interest, money advanced.

THIS suit was instituted in the Civil Court of *Shahabad* by the Respondent, *Martindell*, as executor of *Mary Umdah*, the *Beeby* (or mistress) of General *Martindell*, on behalf of himself, and the minor children of the deceased. The object of the suit was to obtain payment from the Defendant, *Raja Gopal Surn Sing*, since deceased, and now represented by the Appellant, of the sum of Rs. 44,331, the amount of principal and interest on the sum of S Rs. 28,058. 5½ a., which had been advanced by General *Martindell* to the *Raja*, the payment whereof was secured by a conditional bill of sale and mortgage, made in favour of *Mary Umdah* by the *Raja*, dated the 14th day of *September*, 1830, upon certain lands, named *Bussoodhur*, &c., belonging to *talook Buxar*, in the *zilla Shahabad.*

On the 14th of *September*, 1830, General *Martindell*

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillor,—*Assessor*,—Sir A. Johnston.

advanced to the *Raja* the sums of S. Rs. 16,475, and S. Rs. 11,583. 5½ a; and the *Raja* executed a conditional bill of sale and mortgage deed, for securing the repayment of the same. The deed was made out in the name of *Mary Umdah*, the General intending such mortgage to constitute a provision for her and her children. The material part of this deed was in the following terms:—"*Mouza Bussoodhur* and *Hurpoor*, with its *asli* and *dakhili* lands, I have mortgaged and conditionally sold for S. Rs. 16,475, and *mouza Ruttunseinpoor*, *Gogora*, and *chuk Lutchmi*, &c., *asli* and *dakhili*, for S. Rs. 11,583. 5½ a., the total amount value being S. Rs. 28,058. 5½ a., and which amount is the saleable value of the said *mouzas*, to the purchaser, *Mary Umdah*, *Beeby* of General *Martindell*. This sale is true, and according to the laws of the time; and having received the whole of the amount value from the aforesaid purchaser, I have appropriated it to myself, as requisite, and I have made over the villages to the said purchaser, which transfer was also required by law. And I, of my own free will, without coercion, and choice without force, and in possession of all my faculties, have limited the redemption of the villages to twenty years, that is, from the beginning of 1238, to end of 1257, F. E. (3rd *September*, 1830, to *September*, 1850, A.D.), under these conditions; that, after the expiration of aforesaid twenty years, if I at once pay to the purchaser the full and entire amount value aforementioned, then this bill of mortgage will be null and void, and I shall receive back the bill of mortgage and receipt of amount value from the *Beeby*, and I shall take into my possession the mortgaged *mouzas*; but if aforesaid period shall expire, and I at once not pay the amount value, then, by this very

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bill of mortgage, without any other proof, document, or opposition, will prove foreclosure of the mortgage, and will not be capable of being overruled, and will revert to the possession of aforenamed purchaser."

At the time of the execution of this instrument, the *Raja* gave a receipt for the purchase-money, signed by himself and six persons, as witnesses; at the same time he executed a power of attorney, authorising the transfer of the *mouzas* in the Collector's books to the name of *Mary Umdah*, as the mortgagee and conditional purchaser of the same. General *Martindell* died about three months after this transaction, and *Mary Umdah* shortly afterwards died, leaving the Respondent, *Martindell*, and other minor children.

After her death, *Martindell* applied to the *Raja* for possession of the *mouzas*, according to the conditions of the mortgage and bill of conditional sale. The *Raja*, however, refused to put him in possession. *Martindell* then presented a petition to the *Foujdarry* Court of the *Zilla* in which the *mouzas* were situate, praying to be put in possession. The magistrates, however, held that they had no jurisdiction, and passed an order referring him to the Civil Courts for redress. In consequence of this order, and the refusal of the *Raja* to give possession of the *mouzas* in question, the present suit was instituted by the Respondent, on behalf of himself, and as guardian for the other children of *Mary Umdah*, deceased. The plaint was filed on the 14th of *July*, 1835, in the *Zilla* Court of *Shahabad*, against the *Raja*, and alleged, that the *Raja* had fraudulently deprived the Plaintiffs of possession of the mortgaged premises, notwithstanding the deed, and sought to recover the sum of Rs. 28,058. 5½ a., principal of the amount

value, and Rs. 16,273. 8½ a. interest, making together the sum of Rs. 44,331. 14 a.

Before any answer was put in, the Defendant, *Raja Gopal Surn Sing*, died, leaving the Appellant, *Raja Oodit Purkash Sing*, his son and heir, who was duly admitted by the *Zilla* Court to defend the suit.

Raja Oodit Purkash Sing, by his answer, took a preliminary objection to the suit for recovery of the principal and interest; he did not deny the execution of the mortgage and bill of conditional sale by his late father, but submitted that it was contrary to the conditions in the deed, to bring a suit before the expiration of twenty years, the time therein limited; he also denied that his late father had received the amount value mentioned in the deed.

Evidence was entered into on both sides. The Plaintiff filed the deed of mortgage and conditional bill of sale, and the receipt of the money by the late *Raja*. The Defendant examined five witnesses to prove the non-payment of the amount value. Their testimony, however, failed to support this defence.

On the 24th of *April*, 1838, the *Zilla* Court pronounced their decree; which, after going minutely through the pleadings in the cause, proceeded as follows:—" In this case, the principal point to be tried is, whether *Raja Gopal Surn Sing* received the amount value of the conditional sale, or not? In my opinion, Defendant's statement of not having received the amount value is entirely the result of his fraudulent intentions; for this reason, that the seller executed the bill of sale and receipt of amount value, and had the same registered, and in the receipt of amount

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value it is clearly written he received the full and entire sum of the amount value."

It was, therefore, ordered, "that the case be decreed in favour of Plaintiff, and the Defendant be made liable for the costs; and that the sum of Rs. 28,058. 5 a. 6 p., principal, mentioned in the documents, and Rs. 25,635. 15 a. 6 p., its interest, at the rate of one rupee per cent. per mensem, from the 14th of *September*, 1830, the date of execution of documents, to 24th of *April*, 1838, date of decision, and Rs. 1,531..13 a., costs of Court, altogether Rs. 55,226. 2 a., be allowed, with interest on the latter sum, from the 25th of *April*, 1838, to date of realization."

From this decree the Appellant appealed to the *Sudder Dewanny Adawlut*, at *Calcutta*.

Before the appeal came on for hearing, *Martindell*, died; and by an order of the *Sudder* Court, dated the 28th of *May*, 1840, Mr. *William Stacy*, who had also been appointed executor under the will of *Mary Umdah*, with the late Plaintiff, *Martindell*, and guardian of the minor children, was admitted as a Respondent to the appeal.

The appeal came on for hearing, in the first instance, before Mr. *R. H. Rattray*, one of the Judges of the *Sudder* Court, who recorded his opinion, that the decision of the *Zilla* Judge ought to be reversed, on the ground that the plaint was inadmissible, as the Plaintiff could not sue till the expiration of the twenty years mentioned in the bill of sale, and that the remedy was by a suit for possession. The case was then laid before Mr. *E. Lee Warner*, who, on the 24th of *June*, 1841, recorded his opinion, that the decree appealed

from was correct, and worthy of being upheld; that the objection of the claim for receiving back the amount value, being irregular and opposed to the nature of the conditional sale, was inadmissible, and that the evidence showed the money to have been originally paid, and a right of action to have arisen; in support of which he referred to the case of *Kunhai Lal* v. *Nirmal Puri* (5 Ben. Sud. Dew. Rep. 117) as a conclusive precedent upon the point: but as there was a difference of opinion between the Judges, he directed the papers to be laid before a third Judge.

The papers were then laid before Mr. *C. Tucker*, and Mr. *R. Barlow*, who agreed with Mr. *E. Lee Warner*, and finally pronounced the *Sudder* Court's decree on the 27th of *September*, 1841, by which it was ordered, that the appeal of the Appellant be dismissed, and that the decision of the *Zillah* Court be upheld and confirmed, and that the Appellant pay to the Respondents the sum of Rs. 55,226. 2a., the amount mentioned in the decision of the *Zillah* Court, with costs and interest on the same, from the 25th of *April*, 1838 (the day following that of the decision), up to the date of realization, with costs.

Against this final decree the Appellant brought the present appeal, and insisted, that the same was erroneous, for the following reasons:—

1st. Because the suit was improperly instituted for recovery of the money alleged to have been paid by *Mary Umdah*, and that the Respondents, if entitled to sue, ought to have sued for possession of the estate conveyed by the deed of conditional sale.

2nd. Because there was no satisfactory proof that the money sought to be recovered was in fact paid by

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Mary Umdah to *Raja Gopal Surn Sing*, the Appellant's father.

The Respondent, on the other hand, contended, that the decree was right, and ought to be affirmed, for the following reasons:—

1st. Because the evidence proved the execution by *Raja Gopal Surn Sing*, of the conditional bill of sale of the 14th of *September*, in favour of *Mary Umdah*, and established the fact of the receipt by him of the entire amount of the consideration money, for which such deed was given.

2nd. Because the *Raja* having refused to put the Respondent into possession, the present action for payment of principal and interest of the money paid and advanced to the *Raja* was well founded.

Mr. *Turner*, Q. C., Mr. *Forsyth*, and Mr. *J. B. Maule*, in support of the appeal,

Insisted that the transaction was one of conditional sale, and that the present action could not be brought by the mortgagee against the mortgagor's representative for recovery of the purchase-money, as if she had any title, it was to possession; the remedy for which was by ejectment. *Hunt* v. *Silk* (*a*). *Kunhai Lal* v. *Nirmal Puri* (*b*).

Mr. *Wigram*, Q. C., Mr. *Lloyd*, Q. C., and Mr. *Edmund F. Moore*, for the Respondents,

Were not called upon.

The Right Hon. T. PEMBERTON LEIGH:

There will be no necessity to hear the Respondents' Counsel: there is no point, in fact, but as to a deed,

(*a*) 5 East. 449. (*b*) 5 Ben. Sud. Dew. Rep. 117.

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and the rights of the parties under that deed. The question is this, whether, upon the pleadings in this case and the evidence before the Court below, the transaction was complete, or whether it was one that was never completed? Now, both parties agree that possession was never delivered; that is admitted upon the pleadings. It does not appear, however, that they otherwise agree: on the contrary, they dispute both the law and evidence, but they agree upon the principal point on the pleadings. The Defendant also denies the receipt of the purchase-money. It is not, however, necessary to search for precedents. The case depends upon the general principle of law. The party says, I never delivered possession, and never received the money. He disaffirms the transaction. The decree appealed from was a right one; whether all the Judges were right is another question: the decree must be affirmed, with costs.

DOORGA PERSAD ROY CHOWDRY - *Appellant,*

AND

TARRA PERSAD ROY CHOWDRY - *Respondent.**

On Appeal from the Sudder Dewanny Adawlut at Bengal.

3rd & 5th July 1849.

A. sued B., a debtor of his, intestate, upon a bond debt, and obtained a decree against him for the amount. B. appealed from this decree to the *Sudder* Court. By a deed of arrangement entered into by A. and C., after the commencement of the suit, C. became entitled to a six-*ana* share of the debt. Pending the appeal to the *Sudder* Court, A. entered into a compromise with B., postponing the payment of the amount recovered by the decree, for three years, and foregoing altogether interest upon the principal. This was done without the privity or consent of C. B. failed to pay the amount within the stipulated time, and proceedings were taken by A. against him, but he had not realised the amount of the decree. In a suit by C. against A. to make him chargeable for the six-*ana* share in the decree, the Sudder Court held that A. was chargeable to C. for such share, with interest.

Upon appeal, such decree reversed; the Judicial Committee holding, that A. must be treated as a trustee for C., and that in the absence of fraud upon the *cestui que trust* in executing the compromise, or that it was not beneficial for all parties, he was responsible only to C. for such amount of the debt as had been recovered, or without his wilful default might have been recovered.

THIS suit was brought by the Appellant against the Respondent to recover the amount of a six-*ana* share, with interest, of a debt declared due by a decree made in a suit instituted by the Appellant against one *Shama Persad Nundy*. The Appellant compromised the suit without the privity or knowledge of the Respondent,

* Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillor,—*Assessor*,—Sir E. Ryan, Knt.

and the question was, how far he was liable to the Respondent for the loss of such share.

The parties to the appeal were brothers, the sons of one *Gunga Narain Roy*, deceased. *Gunga Narain Roy* had a brother, named *Raj Narain Chowdry*, who had advanced sums of money, at various times in the years 1807 and 1808, to *Bishen Prea Muni*, the mother of *Shama Persad Nundy*, then a minor. To secure repayment of this money, in 1809, a bond was executed in *Raj Narain Chowdry's* favour, for the amount then due, Rs. 11,512 principal, and interest at the rate of 12 per cent. *Raj Narain Chowdry* died in the year 1810, when the money secured by the bond devolved on his brother and heir, *Gunga Narain Roy*. He died in the year 1821, leaving the Appellant and the Respondent, his sons, his heirs and representatives. The Appellant, claiming to be solely entitled, by virtue of a Will made in his favour, by his uncle, to the estate, including the money due on this bond, instituted a suit in the Provincial Court of *Calcutta* against *Shama Persad Nundy*, as the heir of *Bishen Prea Muni*, to recover the sum of Rs. 23,024, the amount of principal and interest then due on the bond. The Respondent intervened in the suit by presenting a petition, in which he objected to the alleged Will, and set forth his right as co-heir with the plaintiff to a half-share of the sum sued for, and prayed that his name might be inserted as a co-Plaintiff, and that half of the amount claimed might be given to him. The Provincial Court refused to insert his name, or make the order prayed for, directing him to institute a suit against the debtor for his half-share. In the year 1827, the Respondent instituted a suit against the Appellant to recover his half-share of the estates.

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Before the hearing, and on the 4th of *April*, 1829, the suit was adjusted between the parties, and deeds of compromise and release were respectively executed. By the deed of compromise, executed by the Appellant, it was declared, that a 6-*ana* share in the money due from *Shama Persad Nyndy* should be the right of the Respondent. The deed of release executed by the Respondent contained a similar arrangement. In accordance with this deed, the Court, on the 2nd of *September*, 1829, gave judgment in the Respondent's behalf, awarding him 6-16ths, or a 6-*ana* share of the estate as his share. Previous to this, and on the 27th of *July*, 1829, the Appellant had obtained a decree in the suit instituted by him against *Shama Persad Nundy*, for the sum of Rs. 23,024, the amount sued for and costs. *Shama Persad Nundy* appealed to the *Sudder Dewanny Adawlut*. Pending such appeal, and in the year 1831, the Appellant compromised the suit. Regular deeds were mutually executed by both parties, but the compromise was effected without the privity of the Respondent. By the terms of this compromise, the Appellant agreed to take from *Shama Persad Nundy* the full amount of the Court's decree, Rs. 24,217. 12a. 17g., with costs to be paid, but without interest, at the end of three years, and upon failure of this condition the Appellant was empowered to enforce payment and to realize the amount. *Shama Persad Nundy* did not fulfil his engagement according to the compromise, whereupon proceedings were taken by the Appellant against him to enforce the original decree.

On the 11th of *March*, 1835, the Respondent instituted the present suit in the *Zillah* Court of *Midnapore* against the Appellant and *Shama Persad Nundy*. The

plaint, after setting forth the facts above mentioned, charged the Defendants with collusion and fraud in the execution of the deed of compromise entered into between them, and prayed, that the Plaintiff might be declared entitled to 6-16ths of the amount of the decree passed by the Provincial Court against *Shama Persad Nundy* in favour of the Appellant, on the 27th of *July*, 1829, amounting to Rs. 8,634 principal, together with interest, from the date of that decree to the date of the filing of the plaint, at the rate of one per cent., amounting to Rs. 5,827. 10a., and making a total of Rs. 14,461. 10a.

The Appellant, by his answer, admitted that the Plaintiff, by the terms of the compromise, was entitled to a 6-*ana* portion of the sum recovered against *Shama Persad Nundy*, but stated that, although a decree had been obtained by him against *Shama Persad Nundy* for Rs. 23,024, yet that nothing had been recovered from the latter under such decree; and he contended that, until the same was realized, the Plaintiff had no claim against him. He admitted the compromise with *Shama Persad Nundy*, whereby he gave up the interest due upon the principal sum; but he denied the imputation of fraudulent motives, and insisted, that he made the compromise, as he found that *Shama Persad Nundy* had power to dispose of his property, and that he was a minor when the debt was contracted, and he alleged that he had been advised to forego the interest.

The other defendant, *Shama Persad Nundy*, by his answer, denied collusion with the Appellant in effecting the compromise, and submitted, that the Plaintiff had no claim against him.

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Evidence was entered into on both sides, from which it appeared that active steps had been taken by the Appellant to recover from *Shama Persad Nundy* the amount decreed against him.

The Judge of the *Zillah* Court of *Midnapore*, Mr. *R. P. Nisbet*, delivered judgment, on the 25th of *August*, 1836, the material part of which was as follows :—" The Defendant, without obtaining the consent of the complainant, filed a deed of compromise entered into between him and *Shama Persad Nundy*, in the *Sudder Dewanny Adawlut*, by foregoing the whole of the interest due on the sum originally decreed to him, taking an instalment ; consequently, it is impossible to exempt *Doorga Persad* from the claims preferred by complainant. But the complainant not having demanded anything from his brother, *Doorga Persad*, during a period of four years and seven months, from the 2nd *September*, 1829, to the date of the Court's decision, of the 12th of *March*, 1835, is no reason why he should not be entitled to the amount of interest due thereon from the date of the institution of the aforesaid suit to the date of final adjustment of the same ; and it is his fault that he neglected to demand payment from his brother. Complainant is only entitled to receive Rs. 8,634 from the Defendant, agreeably to the deed of compromise, besides interest from the date of institution of suit to the date of payment." The other Defendant, *Shama Persad Nundy*, was by the Court's decree released from the suit, on the ground that there was a decree against him as the principal debtor.

Against this decree the Appellant appealed to the *Sudder Dewanny Adawlut* at *Calcutta*, and the Re-

spondent also appealed to the same Court against so much of the decree as disallowed the sum of Rs. 5,627. 10a., on account of interest.

These appeals were heard together by Mr. *E. Lee Warner*, who, on the 25th of *February*, 1840, pronounced that Court's decree in the cause, as follows :— "After a full consideration of the papers of the case, the plea of the Plaintiff, *Terra Persad*, made in his petition, that he is justly entitled to interest from the date of the deed of compromise to the day of payment, is not admissible under the circumstances of the case, for *Doorga Persad's* portion of 6 *anas* is of the whole debt, with interest, which the Judge awarded, and *Shama Persad Nundy* has been released from this suit. It does not even appear that *Doorga Persad* has realized any money from *Shama Persad*, or would hereafter recover, which depends entirely upon himself, and the debt has, therefore, become that of *Doorga Persad*, and the interest from the 2nd of *September*, 1829, to the 12th of *March*, 1835, which the Judge awards, is, in my opinion, proper in every respect." The Court then ordered, that the appeal of the Appellant should be dismissed, and the decision of the Judge of *Midnapore*, dated 25th of *August*, 1836, affirmed.

The Respondent presented a petition to the *Sudder* Court for a review of judgment, which the Court admitted.

The proceedings upon the review of judgment again came before Mr. *E. Lee Warner*, but as he differed from the decision he formerly gave, holding that the Respondent would only be entitled to the principal and interest when it was realized from *Shama Persad*

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Nundy, he directed the papers to be laid before another Judge; accordingly, the proceedings were laid before Mr. *R. Barlow*, who differed from Mr. *E. Lee Warner*, and recorded his opinion, that the Appellant had no power to compromise with *Shama Persad Nundy* without the Respondent's consent, and that the Respondent had an unconditional right against the Appellant, whether the Appellant had realized it from *Shama Persad Nundy* or not; and he decided, upon the authority of *Balnath Sahoo* v. *Rajah Buddun Mohun Singh* (3 Ben. Sud. Dew. Rep. 48), that the Court below had no power to deprive the Respondent of his interest, and he made an order, decreeing the Respondent the entire claim, principal and interest, and directed the proceedings to be laid before another Judge.

The case then came before Mr. *A. Dick*, who recorded his opinion, "That it be decreed to the Plaintiff (Respondent), that he should get 6-*anas* share of the decree of this Court, or of Rs. 24,217. 12a. 17g., after deducting the costs of getting and executing the decree, as above stated. That the District Judge be ordered, that when the decree obtained by *Doorga Persad* (Appellant) is executed and realized from *Shama Persad*, after deducting whatever he might have spent, that portion be paid to the Respondent; and if the former should put off the execution and realization of the decree, the latter might take measures to have it executed; and if it appear that the Appellant neglected to execute the decree, or that there was any fraud, before or after filing the deed of compromise, it would be proper that the costs of both parties be charged to both."

As this opinion differed from those of Mr. *R. Barlow* and Mr. *E. Lee Warner*, it was ordered, that the papers of the case should be laid before a fourth Judge.

Accordingly, the case came before Mr. *David Smyth*, who delivered the Court's final decision on the review of judgment, on the 15th of *April*, 1841, in the following terms:—"There is no doubt, from the statement of both parties, that *Tarra Persad Roy Chowdry* has a share of 6 *anas* in the amount of the decree, and the deed of compromise was admitted by the Provincial Court on the 2nd of *September*, 1829; the Appellant is, therefore, entitled to a share of 6 *anas* of the decree of that Court, dated the 27th of *July*, 1829, obtained by *Doorga Persad* against *Shama Persad Nundy*. It also appears by the papers of the case, that the Appellant petitioned this Court to be included in the decree according to his share, but *Doorga Persad* got the decree in his own name, and no petition was presented before that, nor was any representation made to the Court of *Tarra Persad's* right to a portion of 6 *anas*, and, therefore, Mr. *R. H. Rattray*, a Judge of this Court, passed no order upon the Appellant's petition, on the 16th of *May*, 1831, as he was not one of the parties in the case. It is also clear, that when *Doorga Persad* appeared in Court, and did not join *Tarra Persad* with him, no order could have been passed in that case by the Court upon the petition of *Tarra Persad*. In short, when *Doorga Persad* got a decree, as the alleged proprietor of the entire 16 *anas*, against *Shama Persad Nundy*, and settled it in the same way by a deed of instalments, and the Appellant, by *Doorga Persad's*

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deception, is deprived of the execution of the decree against *Shama Persad*, it is my opinion, that the Appellant can in every respect have his share of the amount of the decree either from his brother *Doorga Persad Roy*, or from *Shama Persad*, the debtor, as he may please. It is clear that *Tarra Persad* had a right from the beginning, in the debt, and he has the power of accepting or not the decree and deed of instalments; and if the Appellant thinks that they were effected by the collusion of *Doorga Persad* and *Shama Persad*, and that his right is injured, the Appellant can recover his share of 6 *anas* of the bond debt from *Doorga Persad Roy Chowdry*. For these reasons, I agree in all respects in opinion with Mr. *R. Barlow*."

It was, therefore, finally decreed, that the decision of the District Judge, dated the 25th of *August*, 1836, be amended, and the whole claim of the Respondent be decreed against the Appellant, with interest from the 27th of *July*, 1829, to the date of the District decision, and interest upon both sums to the day of payment, with all costs of suit.

Against this final decree the Appellant brought the present appeal to Her Majesty in Council.

Mr. *Turner*, Q. C., Mr. *Forsyth*, and Mr. *J. B. Maule*, for the Appellant.

This case has not been properly understood by the Court below. Two questions arise: First, what is the proper construction of the deeds of compromise and release between these parties? Secondly, what is the conduct of the Appellant in entering into the arrangement with *Shama Persad Nundy*? The fair construction of the deeds is, that they merely ascer-

tained and settled in what proportions the Appellant and Respondent were respectively entitled to the debt due from *Shama Persad Nundy*. But the deed of compromise created no obligation on the part of the Appellant to make good the share of the Respondent, or pay the amount over to him. The Court below treats this as an absolute guarantee for the debt, which is an erroneous view of the effect and legal operation of the deed. The Appellant would be treated in a Court of Equity as a trustee, and the Court would hold him liable only to the extent that the decree could have been carried out but by reason of his wilful default. Here he entered into a *bonâ fide* compromise without any fraudulent intention of defeating the rights of the *cestui que trust*; the Court was, therefore, wrong in holding, that upon the mere fact of the Appellant having entered into the compromise with *Shama Persad Nundy*, he was liable to the Respondent for his share due under the original decree. The only inquiry it was competent for the Court to make, was, whether the entering into a compromise was a course expedient to be taken, for the purpose of determining the dispute regarding one estate, in which he was interested jointly with the Respondent. Whether, in fact, such compromise was made fairly, honestly, and *bonâ fide*. We submit that it clearly was. No collusion is proved, nor is it shown that any loss was occasioned by the compromise, nor was there any delay on the part of the Appellant in enforcing payment from *Shama Persad Nundy*. The true question, where a party acting as a trustee or executor, compromises a debt, is, did he exercise a reasonable and sound discretion? If it was for the benefit of the estate, he acting with diligence and

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good faith, a trustee is not chargeable with any loss consequent thereon; this is the rule recognized both in law and equity. *Pennington* v. *Healey* (*a*), *Blue* v. *Marshall* (*b*), *Buxton* v. *Buxton* (*c*), and must be binding in this case. The *onus* lies on the other side to show that this compromise was not *bonâ fide*.

Mr. *Wigram*, Q.C., Mr. *Lloyd*, Q.C., and Mr. *Edmund F. Moore*, for the Respondent.

It was not competent for the Appellant, without the consent of the Respondent, to compromise the right to immediate payment of the amount recovered by the decree, or to forego the right to interest from the date of that decree. Having abandoned those rights, he became personally responsible to the Respondent for his 6-*ana* share, with interest. The Appellant has put himself in the position of an executor to a creditor's estate, having an effectual decree against the debtor for payment of the outstanding debt, for the benefit of the estate, and the *onus* lies on him to show why he did not get in the debt. If he can show that the debtor was in insolvent circumstances, or that the decree was doubtful in law, that may perhaps excuse him.—[Mr. *Pemberton Leigh*: Your case is really this, you say the Appellant had no right to make the compromise, and as he made it he must take the consequence.]—He made a compromise behind our back, and we are entitled to hold him personally responsible for our share. If an executor discharge the debtor, you can only look to the executor.—[Mr. *Pemberton Leigh*: You and the Appellant are jointly interested, and it is a strong proof of his *bonâ fides* in

(*a*) 1 Cro. & Mee. 402. (*b*) 3 P. Will, 381.
(*c*) 1 Myl. & Cr. 80.

the transaction, that he has a large interest. Suppose an action brought by trustees, and one of the *cestui que trusts* says, I think this action is ruinous, and had better be abandoned, and the other should dissent from it, would the trustees be bound to go on because one of the parties dissented? Would not the question depend upon this, was it for the benefit of the whole that the suit should go on? On whom would the *onus* lie of showing that it was not so?]—It would be inequitable to impose the obligation upon the Respondent, of proving that this compromise was not beneficial. In Courts of Equity in this country, in such circumstances, a trustee would apply to the Court to be relieved of the difficulty.—[Mr. *Pemberton Leigh*: Where a trustee takes no step to recover the money, it lies upon him to prove why he has not done so, because that is *primâ facie* evidence of neglect; but if a trustee, being himself jointly interested in the subject of the suit, brings an action and gets judgment, and that judgment is disputed, and in such circumstances he compromises with his opponent, does he not show, that, being a party interested, in doing the best for himself and the *cestui que trust*, he is doing the best in his judgment for the interests of all parties? It must be borne in mind, in this case, that the judgment was not a final judgment, but as a decree under appeal.]—The course to have been pursued was to have called upon the Respondent to consent, or else to have indemnified him. There is no proof that it was a beneficial compromise for all parties; we have shown a *primâ facie* case of misconduct, and that will render him liable to account for whatever he might have received, without his

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wilful default or neglect. In *Shepherd* v. *Towgood* (*a*), it was held, that a trustee was not entitled to compromise the rights of the *cestui que trusts*.

Mr. *Turner*, in reply.

The Right Hon. T. PEMBERTON LEIGH:

We think, that under the deeds of compromise and release, the Appellant must be considered as a trustee, and that the final decree of the *Sudder* Court, holding him liable to the Respondent for the whole amount and interest of his 6-*ana* share, is erroneous. The opinion expressed by Mr. *Lee Warner*, on the review of judgment, which declared the Respondent entitled only to his share of what had been received, appears to us to be correct. Reverse the decree of the Court below, and declare the Appellant responsible merely for what he had received in respect of this deed, or has since received, or, without his wilful default, might have recovered.

The report to Her Majesty, which was confirmed, was as follows:—

"Their Lordships do agree humbly to report to your Majesty, as their opinion, that the said Decree of the Court of *Sudder Dewanny Adawlut* of *Bengal*, of the 15th of *April*, 1841, ought to be reversed, and that it ought to be declared that the Appellant was, and is, liable to the Respondent for a 6-*ana* share of what he (the Appellant) has received, or may hereafter receive, and what, if anything, he might at any time after the 16th of *May*, 1834, (being the expiration of

(*a*) 1 Tur. & Russ. 379.

the time limited by the deed of compromise of the 16th of *May*, 1831,) without his wilful default, have recovered or received from *Shama Pérsad Nundy*, for or in respect of the sum of Rs. 24,217. 12a. 17p., and the interest thereon, payable by *Shama Persad Nundy*, under the decree of the 27th of *July*, 1829, and the said compromise of the 16th of *May*, 1831; and their Lordships are further of opinion, that the cause ought to be referred back to the Court of *Sudder Dewanny Adawlut*, to ascertain, carry out, and enforce the rights and liabilities of the parties as above declared, and that the Respondent ought to be at liberty to apply in the cause of "*Doorga Persad Roy Chowdry* v. *Shama Persad Nundy*," for leave to enforce the decree in that cause, as he may be advised, for the recovery of a six-*ana* share of the said Rs. 24,217. 12a. 17p., and interest, in so far as the same has not been already recovered; and their Lordships do further recommend that any costs paid by the Appellant in the Courts below be repaid him."

MAHA RAJA DHEERAJ RAJA MAHATAB CHUND BAHADOOR - - } *Appellant,*

AND

THE GOVERNMENT OF BENGAL - *Respondent.**

On Appeal from the Special Commissioner of the Moorshedabad Division in Bengal.

14th & 18th Dec. 1848, & 18th Feb. 1850.

THIS was a claim by the *Bengal* Government to resume and assess the Government revenue on cer-

* Present: Members of the *Judicial Committee*,—Lord Langdale, Lord Campbell, Mr. Baron Parke, and the Right Hon. T. Pemberton Leigh.

Privy Councillor,—*Assessor*,—Sir E. Ryan, Knt.

The right of Government to institute proceedings by or before the Revenue Collector, under Reg. II. of 1819, for the resumption of lands for the purpose of assessment to the public revenue, is barred by Reg. II. of 1805, sec. 2, cl. 2, after the lapse of 60 years from the cause of action.

So held by the Judicial Committee of the Privy Council, on appeal from a decree made by the Special Commissioner, upon a claim by Government, where *Mahoteran* lands were held as *La-khiraj* by the *Raja* of *Burdwan*, before the Company's accession to the *Dewanny* in 1765, and no claim had been made by Government to resume the lands for assessment till the year 1836.

The Courts of the Revenue Collector and the Special Commissioner, appointed under Regs. II. of 1819 and III. of 1828, are Courts of Civil Justice within the meaning of the Regulations of Limitation.

An objection raised the first time at the hearing of the appeal before the Privy Council, that the Government's right to sue was barred by the Regulation of Limitation, II. of 1805, from lapse of time, sustained; the proceedings in *India* before the Revenue Collector and Special Commissioner under Regs. II. of 1819 and III. of 1828, not being in the nature of a regular suit.

Semble—The exclusion of lands, as *La-khiraj*, from the Decennial and Permanent Settlements, is of no weight, *per se*, as evidence, of exemption to resumption under Reg. XIX. of 1793.

The general presumption is in favour of the liability to assessment of

tain lands, consisting of eighteen villages, called the *turuf* of *Tajpoor*, situate in the *Zemindary* of the Appellant, the *Raja* of *Burdwan*. These villages formed part of the *Raj* of *Burdwan*, and had been in the possession of the Appellant and his ancestors, the *Rajas* of *Burdwan*, anterior to the East India Company's accession to the *Dewanny* (*a*), in the year 1765, since which time they had uniformly been held as *Lakhiraj*, (free from payment of Government revenue,) down to the year 1836, when the Government for the first time claimed the right to assess them.

It did not appear that revenue had ever been assessed in respect of these villages by any native Government previous to the Company's accession to the *Dewanny*. Surveys had from time to time been made under the native Governments of these lands, one in the year 1582, in the reign of the Emperor *Akbar*, and others at subsequent periods down to the year 1760, the date of the East India Company's possession of *Burdwan*. In the year 1763-4, the Company, before the grant of the *Dewanny* by the *Mogul*, deputed Mr. *Johnstone* to investigate the *La-khiraj* tenures in *Burdwan*, and in consequence of his report, some lands in the *Raj* of *Burdwan* were resumed by the Government, and assessed; but no claim was then made in respect of the lands now in question.

Upon the establishment of the British authority in

(*a*) By this title the East India Company are Receivers-general in perpetuity of the revenues of *Bengal*, *Behar* and *Orissa*, under a grant from the Great *Mogul*.

land, and by Regs. XIX. of 1793 and XIV. of 1825, the *onus probandi* lies on a claimant to *La-khiraj*, to establish his title to exemption; not by inference but by positive proof by a grant, to hold as *La-khiraj*, or by a proprietary right, prior to the grant of the *Dewanny* (12th of *August*, 1765), and that the possession was *bonâ fide* taken under it, or an enjoyment of lands as such, and descendible to heirs at or since that time.

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Bengal, and the settlement of Government, the title of lands in many parts of the Lower Provinces, which were claimed to be held free from assessment, was made the subject of inquiry, and in the year 1782, the Government in *India* being fully established, a Regulation, No. VI. of that year, was passed, appointing a Registrar or superintendent of rent-free lands, for the purpose of investigating the title of persons claiming to hold lands exempt from payment of the Government revenue. This investigation occupied more than four years, during which period, though a register of such lands was made, the lands in questions were not included, nor did it appear whether their title had been investigated. In 1789, the *Bengal* Government made a Regulation for the Decennial Settlement of the revenues of *Bengal*, which settlement was made permanent in the year 1793.

By Regulation XIX., of 1793, section 25, it was enacted, that all persons holding any lands, exempted from the payment of revenue, should register the following particulars respecting them in the Collector's Office, viz.,—The denomination of the grant or other tenure. The name of the grantor. The name of the original grantee. The name of the then possessor, and if he was not the original grantee, the derivation of his title, whether by descent or purchase, or any other mode. The date of the deed, if the grant was in writing; and if not, the date on which the grant was made. The name of the villages comprised in the grant. The measurement of such villages. The *Pergunna* in which they were situate. And lastly, a copy of the original grant or other writings, under which the lands were held.

In the year 1793, the *Zemindaries* of the then *Raja* of *Burdwan* were attached, and the collection of

the revenue derivable from them, was made by the officers of Government. These villages, then in possession of the wives and sisters of the *Maha Raja*, were attached at the same time. Some time after the attachment of the *Zemindary*, the title-deeds of the villages were deposited in the Collector's Offices, and a reference of the case was made to the Governor-General in Council. In 1795, in consequence of an order made by the Governor-General in Council, the *Maha Raja* was again put in charge of his *Zemindary* lands, and the papers of the *Zemindary* delivered to him, and the title-deeds of *Tajpoor*, &c., ordered to be returned to *Maha Ranees*.

In the year 1800, Regulation VIII. was passed, for the registration of lands, whereby it was enacted by section 2, that the Collectors of the several *Zillahs* should proceed to form a registry of lands in their respective districts, to be denominated a *Pergunna* register of lands, *Malguzary* and *La-khiraj*, and that the *La-khiraj* part of such register should comprise the following particulars:—1st. The denomination of the tenure as entered in the register of lands held exempt from the payment of revenue prescribed by Regulation XIX. of 1793, with a reference to the number under which the tenure may have been entered in such register. 2nd. The names of the holder or holders of the tenure as also entered in the register of exempted lands prescribed by the above Regulation. 3rd. A detailed statement of the several villages or other subdivisions of each tenure within the *Pergunna*, for the purpose of being referred to on the register of exempted lands. 4th. The measurement of each village or other subdivisions wherever the same may have been reported by the holders under the requisitions of the

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above-mentioned Regulation. 5th. The gross rents of any village or other subdivision, the gross produce of which might be ascertained. And after making provisions relating to the registration of *Malguzary* lands, by section 7 it was enacted, that the *Pergunna* register was to be prepared from the papers already furnished by the holders of land exempt from the payment of revenue for the registry required to be kept by Regulation XIX. of 1793, as well as any other materials which might have been procured; and should any further papers or information be found requisite for the exact ascertainment of the precise number and names of the villages appertaining to the several estates in each *Pergunna*, or for the purpose of ascertaining any of the particulars to be specified under the four first heads of the *La-khiraj* part of the register, the Collectors were authorized to require the same from the holders of *La-khiraj*, but the Collectors were not to require from the holders of *La-khiraj* lands any papers or information respecting the rents of land of this description, and after allowing a further period of one year from the date of publication for the registry of lands, it declared, that after the expiration of that period, any unregistered land found to be held exempt from payment of the revenue was to be assessed.

In the year 1802 these villages were registered as *La-khiraj*, in the Collector's office, upon a statement put in by the *Ranees* of the *Raja* of *Burdwan*. This statement described the village as "rent-free lands, *Mahoteran*." It did not contain the name of the grantor, but described the manner in which the *Ranees* came into possession, as follows: "In the *Bengal* year 1168, the *Maha Raja* bought from *Bejee Chund Raee*, the son of *Manik Chund Raee*, and gave it to his wives,

who gave it to us." Neither the name of the grantor nor the date or year of the deed, as required by Regulation XIX. of 1793, was described, but no notice of the omission appeared to have been taken by the Government till the year 1836, when the registry being investigated by the Collector, the defects were discovered, and on the 21st of March 1836, seventy years after the accession to the *Dewanny*, the Deputy Collector of *Burdwan* issued, on behalf of Government, a notice, in the form required by Regulation XIX. of 1793, to *Maha Ranee Kunwul Koonwaree*, the mother and guardian of the present Appellant, then a minor, calling upon her to produce, within one month, the title-deeds under which she claimed to hold the villages rent-free. On the 16th of *April*, in the same year, the *Maha Ranee* presented a Petition to the Collector in answer to the notice, in which she stated, that the rent-free lands of her ancestors were settled under the administrations of former *Nizams* for food and clothing of the *Ranees* of the family; whatever monthly allowance was fixed for any *Ranee* by the *Maha Raja* of the time, she derived during her lifetime from the produce of those lands, and after the death of the *Ranees* the monthly allowance devolved to another *Ranee*; that in consequence of length of time and confusion among the *Zemindary* papers, the documents and other papers of these villages had not been found; the answer also raised an objection to the jurisdiction of the *Burdwan* district. The villages, however, were afterwards declared to be within the Collectorate of *Burdwan* for revenue purpose.

The case came before Mr. *W. Taylor*, the Special Deputy-Collector, for investigation, on several occa-

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sions, in the month of *September*, 1836, and *January*, 1837.

The *Maha Ranee* produced before the Deputy-Collector three documents, as evidence of her title to exemption. First, a copy of an order made by the Governor-General in Council, dated the 9th of *May*, 1795, from which it appeared that, in collecting the *Burdwan* revenue, *Tajpoor* and other *Mahoteran* lands had been attached for arrears of revenue, and had subsequently been ordered to be delivered up to the *Zemindar*, and by this order, directions were given for the officers employed in the estate of *Tajpoor*, to receive the amount of collections in hand, with the papers relating to those lands. Second, a copy of an order dated the 5th of *August*, 1795, made in answer to a petition of the *Ranees*, the wives of *Maha Raja Dheeraj Tej Chund Bahadoor*, and *Beebee Kaloon*, sister of the *Maha Raja*, for delivery to them of the original deeds relating to the lands of *Tajpoor*. This order, after referring to the previous order of *May* 29th, 1795, stated, that such deeds had been delivered, according to the Petitioner's request, to the *Vakeel* of the Petitioner, who had given a receipt for the same. The third document was a decree of the *Sudder Dewanny Adawlut*, made in a cause in which *Baboo Neem Chund* was Plaintiff, and *Maha Raja Tej Chund Bahadoor*, Defendant. From this decree it appeared, that *Maha Raja Tilok Chund* was the father of the Defendant, *Tej Chund*, and that *Beejee Chund* was the father of the Plaintiff, *Neem Chund*; and the case was, that *Tilok Chund*, by deed, gave to *Bejee Chund* in the year 1762, an annual allowance of Rs. 3,600, on account of religious and other expenses charged on *Tajpoor*, and which pension was claimed by the Plaintiff in the

suit. It was alleged in defence, that *Tilok Chund* had bought the *Mahoteran* lands in question from *Manik Chund*, and had given them to his wife, and that the payments which had been made by him were so made because he was managing the property for them. The decree was in favour of the Plaintiff.

On the hearing, the *Vakeel* who attended for the *Maha Ranee* was examined by the Collector, when he admitted that the deeds relating to the estate must be supposed to exist, since on the order of the 5th of *August*, it was stated, that they had been delivered to his constituent, but no explanation was given why they were not produced; he was also unable to give any explanation with reference to the grant to *Manik Chund*, or why the name of the original grantor was omitted in the statement registered in 1802, although the deeds were then in their possession.

There were several applications made for time to search for documents, which were granted.

On the 24th of *January*, 1837, the Deputy-Collector delivered his decision. After fully reviewing the case, and after noticing in particular the defective statements in the register; the want of proof in support of the claim to hold the villages as *La-khiraj*, notwithstanding the extended indulgence which had been allowed to obtain evidence; and the circumstances of inconsistency and suspicion attending the case; he ordered, that the case be decreed in favour of Government; that the property in dispute be resumed by Government, and that the Collector of the District of *Burdwan* should attach and assess the property.

The *Maha Ranee* appealed from this decree to the Court of Special Commission, acting under Regulation III. of 1828, for the division of *Moorshedabad*, sitting

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at *Calcutta*. The appeal was allowed on the 4th of *April*, 1837, when the agents of Government were ordered to file an answer to the grounds of appeal, and the execution of the decree of the Special Deputy-Collector was suspended in the meantime. The Government put in an answer. No further evidence was produced before the Special Commissioner. Inquiry was made for the original deed, but the answer was, that it could not be found.

The appeal came on for hearing before Mr. *T. H. Maddock*, on the 11th of *August*, 1837, when the Commissioner, after fully reviewing the case, declared, that the decision of the Special Deputy-Collector, directing the resumption of the lands, was correct and proper, under the Regulations in force, and ordered, that the appeal of the Appellant be dismissed, and the decision of the Special Deputy-Collector affirmed, and that the Officers of Government proceed to assess the villages according to the Regulations.

On the 25th of *September*, the *Maha Ranee* presented a petition to the Special Commissioner, alleging, that she had obtained a copy of the deed of the villages in question, and praying for time to present a petition for review, and file further evidence. This being admitted, the *Maha Ranee*, on the 1st of *November*, presented a petition for that purpose, and filed, as additional evidence, three documents, viz., First, a copy of a deed bearing date 1169, B. E., from *Raja Tej Chund* to *Baboo Beejee Chund*, of the annual sum of Rs. 3,600 charged upon *Tajpoor*, for his expenditure, and certain religious expenses. Second, a copy deed of assignment, bearing date 1156, B. E., from *Raja Tilok Chund Rae* to *Baboo Beejee Chund Rae*, of cer-

tain lands in the *Pergunna Buhia*, as *Mahoteran*, to be enjoyed in succession by his sons, grandsons, &c. And thirdly, a list of *Mahoteran* villages and lands of *Baboo Beejee Chund Rae.* There was nothing, however, in these documents to show that *Tajpoor* and the other villages, were revenue free.

After a perusal of these documents, the Special Commissioner was of opinion, that there was no ground to admit a review of judgment, and dismissed the petition; the *Maha Ranee* then appealed to Her Majesty in Council. Pending the appeal to *England*, the present Appellant attained his majority, when the *Maha Ranee*, his guardian, was removed, and the Appellant's name substituted instead of hers.

The appeal now came on for hearing.

Mr. *Turner*, Q. C., and Mr. *Leith*, for the Appellant.

The right of the Government to resume these villages for the purpose of assessment to the public revenue is to be considered under three separate heads. First, the Revenue Regulations; Secondly, the length of enjoyment of these lands as *La-khiraj*, by the Appellant, and those under whom he claims; and, Thirdly, the Regulation of Limitation, as barring the Government's claim.

I. It is admitted, that by the immemorial law of *India*, land, or a portion of its produce, belongs to the State. The preamble to Regulation XIX. of 1793, fully explains the Government's right. The tribute rendered on this account is termed *Khiraj*. In some cases Government has divested itself of the revenue of particular land in favour of some individual or body of persons, or some public charity or religious insti-

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tution; in such case the land is called *La-khiraj*, or exempt from revenue. The *Dewanny* was granted to the East India Company in 1765, by the Emperor of *Delhi*, which is the foundation of their claim to Sovereignty and their title to the revenue of *Bengal*. The first Regulation touching rent-free lands was passed in 1769, which authorised supervisors to investigate the titles of *Zemindars* claiming exemption from revenue. In 1772, there was a Settlement of the revenue which was assessed on lands for five years. Further settlements of the revenue took place in 1778, 1779, 1780, and subsequent years. It is not asserted by Government that the villages in question were included, either in the settlement of 1772, or in any later settlements. For the purpose of placing the rights of *La-khirajdars* upon a legal basis, and of effectually excluding fraudulent or unfounded exemptions from assessment, Regulation VI. of 1782 was passed. This Regulation enacts, first, that all grants of land previous to the date of the grant of the *Dewanny* to the East India Company should be deemed valid; secondly, That all grants of lands subsequent to that period, under the general denomination of *La-khiraj*, should be declared invalid, except such as have been confirmed by the Governor-General in Council; thirdly, that possession antecedent to the 12th of *August*, 1765, should be admitted as of equal validity with any grant or title-deed; fourthly, that all transfer of property in rent-free land whether by purchase or sale, deed of gift or bequest, subsequent to the 12th of *August*, 1765, should be valid, provided the grants existed before that time, or possession before that period could be proved. By the same Regulation a registry of rent-free lands was esta-

blished, and further powers were given to the Superintendent in making the registry by Regulation VIII. of 1793. It must be presumed, in the absence of all evidence to the contrary, that these villages, constituting a considerable tract of country, were not exempted from the inquiry so instituted by Government in pursuance of the Regulations, and that the title under which they were held, as *La-khiraj*, was investigated and confirmed by the Government officers. It is impossible that the existence of villages of such extent as these, paying no revenue to the Government, could have been unknown to the revenue authorities. That fact, however, could have been satisfactorily established by the production of the register which was made on that occasion; but notwithstanding a Petition for production of all documents relating to this property, Government have not produced the register. The office of Register was abolished by Regulation XVIII. of 1796, and transferred to the Collectors.

The next Regulation bearing upon this subject, is LI. of 1790: section first, enacts, that all grants of rent-free lands made previous to the 12th of *August*, 1765, should be valid, provided the grantee had actually and *bonâ fide*, obtained possession previous to that date, and the lands had not been subsequently resumed by the Government. By the Decennial Settlement for the revenues of *Bengal*, directed by Regulation LXXII. of 1791, the *Jumma* assessed upon lands was to be continued after the expiration of ten years, and then to remain unalterable for ever. Section 33 of this Regulation, provides, that the assessment should be fixed exclusive and independent of all existing *La-khiraj* lands, whether exempted from public revenue assessment, with or without due authority.

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This Decennial Settlement was made perpetual by Regulation I. of 1793, which declared, that no alteration was to be made in the assessment the *Zemindars* and other proprietors of land had agreed to pay, and that they and their heirs were to hold the lands at such assessment for ever. These villages were not included in this Settlement. The admitted exclusion of these villages from the benefit of the Decennial Settlement raises, we submit, an irresistible presumption that the *Maha Raja* then, with the knowledge and sanction of the Government, claimed to hold, and did hold, these villages exempt from the payment of revenue. It is impossible to suppose that the successive owners were permitted to hold them, as *nankar*, *nij-joot*, *chakeran*, or other private lands appropriated for the families of *Zemindars*, as sections 34 and 35 of Regulation LXXII. of 1791, expressly required that lands held under those tenures, or appropriated, should be annexed to the *Malguzary* lands, and assessed as such, under the provisions of the Decennial Settlement. Regulation XIX. of 1793, affirmed the principles adopted in the law of 1782, as the foundation of the title to exemption, and declared, that when the possessors of rent-free lands held their lands for life only, such possession should not have the effect of converting their limited tenures into a title to hereditary or perpetual exemption; and by section 2, clause 1, it was declared, that all grants for holding lands exempt from payment of revenue made previous to the 12th of *August*, 1765, by whatever authority, and whether by a writing, or without a writing, should be deemed valid, provided the grantee actually and *bonâ fide* obtained possession of the lands previous to that date. In the year 1800, Regulation VIII. was passed,

directing the Collectors to make a registry of lands, *Malguzary* and *La-khiraj*. In conformity with the provisions of this Regulation, these lands were registered in 1802, as *La-khiraj*. No question was then raised to the authenticity of the description, and we submit, that it formed a sufficient registration of the villages.

By Regulation II. of 1819, power was given to the Collectors with respect to *La-khiraj* property in *Bengal*, that wherever they believed lands were liable to assessment, to institute proceedings respecting such lands. Further rules to be observed by Collectors in investigation of claims to hold land exempt from revenue, were laid down by Regulation IX. of 1825, and section 5, clause 9, of that Regulation applies to cases investigated by Collectors under Regulation II. of 1819, or under the provisions of the Regulation itself, the provisions of certain previous Regulations, by which the Collector was declared competent to hear and determine suits. Section 2 recognises the validity of *La-khiraj* tenures, of which uninterrupted possession should have been held, exempt from assessment, at and subsequent to the 12th of *August* 1765, which it declares shall be considered valid without evidence of any formal grant or confirmation of the same. Clause 3 effected an important alteration, for the burthen of proof is shifted from the Government, upon whom it rested up to that period, to show that the lands were liable to assessment, and thrown upon the party claiming to hold or recover *La-khiraj*. We submit, that the circumstances of this case are such, as to entitle the Appellant to exemption from the operation of this Regulation, it cannot be held applicable: he has proved possession of the villages

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antecedently to 1765, and down to 1825, a period of sixty years, and the Government cannot show that these lands are liable; surely a provision so arbitrary, was not intended for a case like the present. The last Regulation upon this subject is Regulation III. of 1828; this merely changed the *forum*, and appointed Special Commissioners to take cognizance of matters appealed from the Collectors, in lieu of the Civil Courts. Such is the purport of the Regulations which bear upon this case, and upon a fair construction of them, we submit, that these villages have been illegally resumed, and declared liable to assessment.

We submit further, that upon the evidence produced, these lands are clearly exempted. The possession of these villages by the Appellant, and those through whom he claims, is not denied by Government. Continual possession is shown. Previous to the acquisition of *Burdwan* by the British Government, the villages were held under a grant by *Manik Chund*. They came afterwards into the hands of *Maha Raja Tilok Chund*, the ancestor of Appellant, who granted them to *Baboo Beejee Chund*, and they were subsequently repurchased by the *Maha Raja*, and the rents devoted to the maintenance of the *Maha Ranees*. No Government revenue has ever been assessed upon, or paid for, these villages, to either Native or British Government. If revenue had been assessed, the public records in possession of the Government would afford some evidence of such payment, but no evidence to that effect has been produced.

There is nothing to show that the *Maha Raja* had not power to make a rent-free grant. At and before the time the Company took possession of *Burdwan*, the *Maha Raja* was not a mere *Zemindar*,

he had higher powers, he could make a grant of this nature. Such grants have been recognized and confirmed by the Courts in *India*. Thus, in the case of *Ramdoolal Misser* v. *Muddun Mohur Bhuttercharya* (*a*), a grant of this description of *La-khiraj* tenure, called "*Birmooter*," to hold free of assessment, made by a *Zemindar*, in *Burdwan*, was upheld by the *Sudder Dewanny* Court. So, in the case of *The Collector of Moorshedabad* v. *Bishennath Rai* (*b*), a similar grant to hold rent-free land as "*Dewuttur*," was confirmed by the Court. Again, in *The Government* v. *Maharajah Konwur Baboo Kerut Singh* (*c*), the Court entertained a suit by a grantee of *La-khiraj* lands called "*Nankar*," against the revenue authorities for a resumption of the *La-khiraj*, and the Court recognized the power of the donor to make a grant of land rent free. Another ground equally conclusive, is, that this grant has been recognized and confirmed by the Governor in Council; the authorities attached the *Zemindary* in 1794, the title-deeds were examined by the Governor-General in Council, and this circumstance affords conclusive evidence against the Government, that these villages were then held exempt from the payment of revenue, and were so recognized and treated by the competent authorities, as provided by Regulation VI. of 1792, for that purpose. It was held by the *Sudder* Court, in the case above cited, that where Government had at one period virtually recognized the right of a donor of a *La-khiraj*, by relinquishing to the donee the land, after an interruption of the possession, they were bound by it, and they could not contest the legality of the gift. *Government* v. *Maharajah Konwur Baboo Kerut Singh.*

(*a*) 2 Ben. Sud. Dew. Rep. 143. (*b*) 1 Ben. Sud. Dew. Rep. 174.
(*c*) 6 Ben. Sud. Dew. Rep. 100.

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The proceedings in the Courts below were altogether irregular, and not in conformity with the Regulations. The law which regulates the duties of Collectors acting under the directions of the Board of Revenue, authorized to institute inquiries respecting *La-khiraj* lands, is laid down in Regulation II. of 1819. By section seven, it is enacted, that in all cases of land supposed to be liable to assessment, the Collector shall institute a full and particular inquiry into the circumstances and condition of the land in question at the period of the Decennial Settlement; and, by section fifteen, it is enacted, that when a party whose lands it may be proposed to assess, shall appear and deliver up his title-deeds, the Collector, after duly examining them, shall deliver to such party a statement of the grounds on which his lands appear liable to assessment, with copies of all documents on which such opinion may be founded. Here the Collector, in defiance of the provisions of the seventh section, omitted to institute an inquiry into the state of the land in question at the period of the Decennial Settlement, which it was most important for the interests of the Appellant that he should have done. Again, when the *Maha Ranee* produced her written evidence of title, the next step to be taken by the Collector, according to section 15 of Regulation II. of 1819, was to deliver to her the statement of the grounds upon which her lands appeared liable to assessment; but, notwithstanding that this provision remained unaffected by Regulation IX. of 1825, and the express enactment of Regulation III. of 1828, section 4, clause 1, that the Collector should proceed to the investigation of the case in the manner provided in Regulation II. of 1819, and IX. of 1825, no such statement was delivered

by the Collector, nor were any copies furnished of any documents on which the Collector's opinion was founded. These omissions are fatal objections to the legality of the proceedings. Under the revenue Regulations, the Collector holds at the same time the incompatible offices of prosecutor and judge; he is directly interested in proving the lands chargeable: by Regulation LVIII. of 1795, the Collector gets 25 per cent. on the amount of annual *jumma* on the lands resumed and declared liable to assessment. The great hardship we complain of, is, that the Government have fixed the land with assessment without producing a single document showing its liability. They have in their possession Mr. *Johnstone's* report, the surveys taken, and the various Settlements and accounts relating to *Burdwan*, but they refused to produce them.

II. The right to hold these villages free of assessment was never disputed until the institution of the present proceedings, in 1836, when the Government, for the first time, claimed the right to assess them; we submit, upon this branch of the case, that the Appellant and those through whom he claims, having uninterruptedly held these villages from a period before the Company's accession in 1765, until the institution of these proceedings, upwards of seventy years, exempt from revenue, the villages cannot now be resumed. Regulations VI. of 1782, XIX. of 1793, and XIV. of 1825, expressly recognize the validity of *La-khiraj*, where a prescriptive title is shown anterior to the 12th of *August* 1765.

III. But clause 2, section 2, of Regulation II. of 1805, is a complete answer to the Government's claim. This clause limits the cognizance of the claims of

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Government to those duly preferred within sixty years, from the origin of the cause of action. Here the Appellant's ancestors have been in possession of these lands without paying public revenue for upwards of sixty years before the present proceedings were taken, and the right of action of the Government is barred, by lapse of time.—[Mr. *Pemberton Leigh*: Was this objection taken before the Collector?]—It does not appear to have been, but we submit that it is not now too late to set up this Regulation as a defence to the Government's claim.

Mr. *Wigram*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the *Bengal* Government.

The claim of the Appellant to hold the lands in question, free from revenue, is unsupported by such evidence as is required by the Regulations; and the decisions of the Collector and Special Commissioner, directing their resumption for the purpose of assessment, was correct and proper. First, we submit, that the *onus* of proof that the lands were *La-khiraj* lies upon the Appellant, and we submit, that he has failed to prove possession, by those under whom he claims, of these lands, as rent-free tenure prior to the year 1765. Secondly, we say, that the just result of the evidence produced by him affords a strong presumption, that there was no *bonâ fide* possession prior to 1765. Thirdly, we maintain, that the case is not to be tried so much by possession prior to 1765, as by the documentary evidence produced before the Collector, and that the deeds put in proof, negative the inference that these lands are of rent-free tenure. Fourthly, that the title to the lands not being properly registered, the villages are resumable by Government, for defect of

registration. And Fifthly, that the Regulation of Limitation, II. of 1805, section 2, clause 2, does not apply to the present case.

I. By Regulation XIV. of 1825, section 3, clause 3, it is enacted, that proof of possession of *La-khiraj* lands lies upon the party claiming to hold such lands, exempt from revenue. Now, the registration in 1802, being imperfect, does not afford evidence of the lands being held rent free from the period and on the terms required by Regulation XIV. of 1825. The Appellant urges that, if the revenue had been paid before 1765, the public accounts would show such payment.—[Mr. *Pemberton Leigh*: The Appellant was to prove a negative, that they had not paid revenue, and you might have procured evidence to show that he had paid it.] —It was not the duty of Government to produce such accounts, the burden of proof was thrown upon the Appellant by positive law. But if such accounts had been produced in the Courts below, they would have afforded no proof of the village of *Tajpoor*, &c., paying revenue; these villages not being assessed separately, but included in the gross amount of the district for which the *Maha Raja* is assessed. Again, it is said that neither in the annual Settlements made in the years 1766, 7, 8, and 9, or in the Decennial and Permanent Settlements in 1791, were these lands included as yielding a revenue to Government, and that the Government ought to produce them. Assuming that the villages were not included in these Settlements, still it would not satisfy the requirements of Regulation XIV. of 1825, sec. 3, cl. 3. Next, it is argued by the Appellant, that by Regulation VIII. of 1793, a registry was directed to be made of rent-free lands, and that such registry was not produced by the Govern-

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ment. This is an entirely new point taken here for the first time: the answer to it, however, is conclusive; it was never asked for by the Appellant; and even if produced, would not show what lands were rent free and what were not; for the registry is general, and not confined to rent-free lands. We admit that, in 1802, these villages are described in the Registry, as *La-khiraj*, but we contend, that such mere description does not satisfy the requirements of Regulation XIV. of 1825. By that Regulation, two modes of proof are provided: first, evidence of a grant in writing, prior to 1765, by a person competent to make such grant; and secondly, evidence of actual possession anterior to the grant of the *Dewanny* in 1765.—[Mr. Baron *Parke*: That the lands were held as of right?]—Yes. Then evidence of a written grant is dispensed with, and the owner has the benefit of a prescriptive title. But the burthen is still on him to prove such possession anterior to 1765.—[Lord *Campbell*: If it were not for the positive law throwing the burthen upon the party claiming exemption, the length of possession would be strong evidence against the Government.]—Regulation XIV. of 1825, is in *pari passu* with Regulation XIX. of 1793, and they must be construed together. Now the latter Regulation lays down the rule, that there must be positive evidence of a grant by the ruling power anterior to 1765, or *bonâ fide* possession at or before that date, and Regulation XIV. of 1825 throws the *onus* upon the party claiming *La-khiraj* to establish affirmatively such title as is required by Regulation XIX. of 1793. It was further insisted by the Appellant, that there has been an adjudication by the Governor-General respecting these very lands, which takes the case altogether out of the Regulation of 1825. This is a defence never raised

in the Court below; the answer, however, to it, is, that Regulation XIV. of 1825, required the Appellant to prove that the lands in question were *La-khiraj*, which he failed to do: the lands were, therefore, properly resumable for assessment.

II. The conclusion from the evidence produced by the Appellant is, that there was no *bonâ fide* possession. The registry of 1802 contains no statement of the name of the grantor, or the date or year of the deed, as required by Regulation XIX. of 1793, to render such registration effectual, and these omissions the Appellant ought to have accounted for. By the entry on the registry it is stated, that the name of the original grantee was *Raja Manik Chund*; it also states that in 1761, the *Maha Raja* bought it from *Bejee Chund Raee*, the son of *Manik Chund*, and gave it to his wife. It was stated by the *Vakeel* before the Collector, that the grantor was *Maha Raja Tilok Chund*, a former *Raja* of *Burdwan*. If so, the alleged origin of the claim to a *La-khiraj* tenure was under a grant from the *Maha Raja*, prior to the grant of the *Dewanny*. Now there is no ground for maintaining that the *Maha Raja* had authority to make an effectual *La-khiraj* grant. Regulation XIV. of 1825, section 3, cl. 5, confines the legality of such grants to the Kings of *Delhi*, and the *Soobadars* of *Bengal*, and other potentates therein specified. In the case of *Government* v. *Maharajah Konwur Baboo Kerut Singh* (*a*), there was no doubt that the land was rent free; but, supposing the *Maha Raja* had the power to make such a grant, it appears that he himself afterwards bought in this grant, the consequence of which would be, that any *La-khiraj* rights previously

(*a*) 6 Ben. Sud. Dew. Rep. 100.

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created by him would merge in his superior title, and it would then remain to be proved that the alleged grant to the *Ranees* was a renewal of the *La-khiraj* tenure; the repurchase by the *Maha Raja* was in 1761, only four years before the Company's accession to *Burdwan*, and unless the alleged grant to the *Ranees* was in the interval, it could not possibly be a valid *La-khiraj* grant. The whole statement carries with it great suspicion; the case suggested is, that the *Maha Raja* first granted the lands as *La-khiraj* to *Manik Chund*, a dependent; that the *Maha Raja* afterwards repurchased of him these lands as *La-khiraj*, and appropriated them for the benefit of his family; the case is one of those described in the preamble to Regulation XIX. of 1793, where, previous to the Company's accession, a *La-khiraj* grant was made by a *Zemindar*, without lawful authority, under the pretext that the produce was to be applied to religious or charitable uses, but in truth with a view to appropriating the produce to the use of the grantor.

III. Independently of the presumption against the *bonâ fide* holding of these villages, the case, upon the Appellant's own evidence, fails to establish a *La-khiraj* tenure. The only evidence produced consists of three documents. First, the copy of the order of the Governor-General in Council, made on the 9th of *May* 1795. It is suggested that this order was evidence, that in 1795, the Government having attached the lands for arrear of revenue, had afterwards released them on the ground that they were *La-khiraj*. But, clearly, the document proves no such case; it does not show under what circumstances the order was made, whether upon the ground that the arrears for which

the *Zemindary* were attached had been subsequently satisfied, or for what other reason. The second document was a copy of an order, dated the 5th of *August* 1795. This document obviously contained nothing to confirm the claim to *La-khiraj* tenure. It is, however, important, because it shows, that in the year 1202 B. E. the deeds relating to the villages were in the possession of the *Ranees*, and it may be considered certain, that if amongst those deeds there had been any deed by which the lands were effectually granted as *La-khiraj*, the name of the grantor and the date of such deed would have been mentioned in the statement made on the Register. The only other document produced was the Decree of the *Sudder Dewanny Adawlut*. The proceedings in that suit did not mention any deed by which the lands were made *La-khiraj*.

IV. The registration of these villages in 1802, as *La-khiraj*, is clearly insufficient and ineffectual: the omission of the name of the grantor, and of the date and year of the deeds creating such grant, as required by Regulation XIX. of 1793, section 25, and Regulation VIII. of 1800, is fatal, and the Government was entitled, on that ground alone, to resume the villages for purpose of assessment to the public revenue. It is, however, now contended, that the proceedings before the Collector were irregular, and that by Regulation II. of 1819, the Collector upon an investigation of the evidence, ought to have prepared a statement of the grounds upon which the villages were liable to assessment, which he had failed to do. This Regulation only applies, when a party has delivered up his title-deeds. The Court will presume that everything necessary in the case was shown. The maxim "*Omnia præsumuntur*

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legiteme facta donec probatur in contrarium," is a sufficient answer to this objection.

Lastly. An objection is now taken, for the first time, that clause 2, section 2, of Regulation II. of 1805, bars the right of the Government. It is too late to urge this objection now; there is no trace of such Regulation being ever pleaded in these proceedings in *India*.—[Mr. *Pemberton Leigh*: There appears to be no pleadings in this case either before the Collector or the Special Commissioner.]—The parties appeared by *Vakeels*, and filed petitions and evidence. It would be highly inconvenient if this objection was now to be entertained. There are, however, three complete answers to this objection, that the Regulation applies: First, the possession, in this case, was not *bonâ fide*. Section 3, clause 4, Regulation II. of 1805, enacts, that no length of time shall give a sufficient prescriptive right of property, if it has not been derived under a *bonâ fide* title. Secondly, a new title accrued to the Government by the defect of Registration in 1802, giving a new right of action. Thirdly, Regulation XIV. of 1825, must be considered to have qualified Regulation II. of 1805, as applicable to cases of this particular kind; indeed any other construction would render Regulation XIV. of 1825, completely nugatory.

Mr. *Turner* in reply.

Their Lordships reserved judgment.

6th Dec. 1849.

On the 6th of *December*, 1849, the case was mentioned by Mr. Baron *Parke*, who called the attention of Counsel to the difficulty that had been raised in

the argument, whether, under the Regulation of 1805, the claim to assess the lands in question, was not barred by reason of sixty years having elapsed since the original cause of action accrued. The learned Judge stated, that he had looked through the Regulations, and had put down upon paper those which seemed to bear upon the question, which he handed to Counsel (*a*).

(*a*) The following is a copy of the paper referred to by the learned Baron and handed to Counsel by him :—

" Another objection was taken to the right of the Respondents to have the villages in question assessed, viz. that sixty years had elapsed since the Respondents had that right; and that it was barred, therefore, by the Regulation II. of 1805, section 2, Article 2.

" This objection was not mentioned in the Indian Courts, nor in the printed cases in appeal. It was brought forward for the first time on the arguments before us, which creates a strong presumption against its validity.

" The Regulation, is as follows :—' All claims on the part of Government, whether for the assessment of land held exempt from the public revenues, without legal and sufficient title to such exemption, or for the recovery of arrears of the public assessment, or for any other public right whatever (the judicial cognizance of which may not have been otherwise limited by some special rule or provision in force), shall be heard, tried, and determined in the several Courts of Civil Justice to which the cognizance thereof may properly belong, under the general Regulations which have been or may be hereafter enacted if the same be regularly and duly preferred, at any time within the period of sixty years, from and after the origin of the cause of action.

" In the year 1825, on the 14th of *July*, in that year, and consequently within less than a month from the expiration of the sixty years from the 12th of *August*, 1765, the period when the right of the Government to assess these lands first accrued, the Regulation of 1825 was made, which we have before mentioned, and which contains provisions requiring the strict proof which we have before stated. Now, if the claims of Government to assess all lands claimed to be *La-khiraj*, in *Bengal*, *Behar*, and *Orissa*, had been supposed to be liable to be barred in a very few days, it cannot be

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He added, that it appeared to him that the Regulation applied only to cases where there is a power to sue in supposed that such special and stringent enactments would have been made as to the conduct of enquiries into the validity of the claims to hold free from assessment, without any extension of time for that purpose. This argument is not conclusive, because it is only a proof that the legislative authority itself thought that there was no such bar, and though that is not their province, but that of the Judicial authorities, yet it induces us to feel great doubt as to the validity of the objection, now, at so late a period brought forward,

"Upon full consideration of that and the other Regulations on this subject, we think that the claim on the part of the Government was not barred by this Regulation. By Regulation XIX. of 1793, section 12, the claim to prosecute for the resumption of invalid grants was to be preferred in the *Adawlut* Courts, and no lapse of time was to be considered as a bar to the resumption. As the law then stood, at the time the Regulation in question passed in the year 1805, there was an obligation on the Officers of Government, to sue in the Civil Courts, and no bar in these suits from time.

"The Regulation of 1805 made this difference, it provided, that the limitation of twelve years, prescribed by previous Regulations to all suits, should not be considered as applicable to claims on behalf of the Government; and then the 2nd Article fixes the limitation of time for such claims of Government, in suits in the Civil Courts. Afterwards other resolutions passed which rescinded the provisions, that the Government should sue in the *Adawlut* Courts in order to resume or make an assessment on *La-khiraj* lands (which suits alone are limited, by Regulation II. 1819, section 2, clause 2); and the proceedings are directed to be in the first instance before the Collector, subject to appeal to the Court; and afterwards by Regulation III. 1828, to Special Commissioners, by the party grieved, and this mode of proceeding is not subject to any limitation of time whatsoever—it is only the proceeding by such, and the question, therefore, would be, whether a suit, in an *Adawlut* Court, by the Government, would have been barred, or not, by the Regulation of 1825, if the power to sue had been continued. The limitation is not applicable to the special proceedings under the Regulations of 1819 and 1825, under which the proceeding, the subject of this appeal, was taken: we incline to think, therefore, that this objection cannot prevail."

the Superior Courts, and not to a proceeding, as in this case, before a Collector.

7th Dec. 1849.

On the following day, Judgment was delivered, as follows, by

Mr. Baron PARKE:

This case was argued before their Lordships at the sittings in *December* last. The importance of the question, both to the East India Government as well as to the Appellant, has called upon us to give it the fullest consideration; and the result of that consideration is, that their Lordships think, that the decisions of the Collector and Special Commissioner, before whom the claim of the Appellant was litigated in *India*, are right (subject to a point which I shall afterwards observe upon, arising for the first time in the argument before us upon the Regulations of Limitations), and that their Lordships ought to advise Her Majesty to affirm those decisions by which it was declared, that the property of the Appellant was liable to assessment.

The claim of the Appellant, the *Raja* of *Burdwan*, was to the exemption of the *turuf* of *Tajpoor*, consisting of eighteen villages, of large annual value, in his *Zemindary*, from assessment to the Government revenue, as being *La-khiraj* lands. The case depends mainly upon the principle which we ought to adopt in deciding whether this species of property is liable to assessment or not. If we were at liberty to decide this case upon the same principle of long and quiet enjoyment, on which we should act if a claim for some similar right or exemption were before us, in an English Court of Justice, without express statutory

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regulations for the conduct of the inquiry, we are not prepared to say that there is not evidence on which a jury might and ought to presume in its favour, in the absence of proof on the part of the Government, that any revenue was received from this particular district for seventy years and upwards. There is, in the first place, the omission (if unexplained) of all mention of the District on the occasion of the Decennial and Permanent Settlements, as being liable to pay revenue. Secondly, the withdrawal of the Collectors from the *Zemindary*, including the District described in the Order, as "*Mahoteran*," in the year 1795. And, thirdly, the Registry, though imperfect, of this District, as "*Mahoteran*," in the year 1802, which indicates a formal claim to exemption at that time.

But that is not our duty in the present case, but to decide according to the express provisions of the Regulations of the East India Government, which are as obligatory for the purpose, as the Statute law of the land; and the question, therefore, is, whether such proofs of exemption, or right to exemption, as these Regulations require, have been given?

The material Regulations are, XIX. of 1793 and XIV. of 1825. The preamble of the first fully explains the nature of the right of the Government, and the frauds committed upon it, not only by the *Zemindars*, but by Officers of Government themselves procuring grants to be made under the pretext that the produce of the lands was to be applied to religious or charitable purposes, such grants being generally made with a view to the clandestine appropriation of the produce to the use of the grantor. It proceeds to state, that the Government was induced by its lenity to adopt as a principle, that grants of this description,

made previous to the date of the *Dewanny*, 12th of *August*, 1765, (provided the grantee had obtained possession,) should be allowed to the extent of the intentions of the grantor, so far as they were ascertainable from the terms of the writings, or from their nature and denomination of the lands. It recites, that *Zemindars* were in the habit of making grants to their dependents for their own use, ante-dating the Deeds. It states the intention of the Governor-General to recover the public dues thus alienated, and the purposed omission from the Decennial Settlement of all *La-khiraj* lands, whether exempted from the public revenues, with or without authority, in order that the Governor-General might impose such assessment as he might deem equitable on all lands then alienated and paying no public revenue, which should be proved to be held under illegal and invalid titles. At the same time it states the Governor-General's wish, that persons claiming under valid titles should be secured in the enjoyment of their property. The Regulation then proceeds to enact rules with a view to facilitate the recovery of dues from lands held under invalid grants, &c. The first of these rules is, that all grants previous to the 12th of *August*, 1765, by whatever authority, and whether by a writing or without, shall be deemed valid, provided the grantee actually and *bonâ fide* obtained possession of the land granted, previously to that date, and the land shall not have been subsequently made liable by the Officers of Government. But if it shall be proved to the satisfaction of the Courts, that the owner did not get possession, or that the lands had been since subjected to the payment of revenue, the grant is to be deemed invalid. It was also provided, that the heirs of the grantee

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should not be entitled, under a grant, unless named therein, or the grant should be from its nature, or according to the usage, hereditary.

Under this Regulation, it is obvious, that the exclusion or omission from the Decennial and Permanent Settlement, of lands, as *La-khiraj*, is of no weight, as evidence of title to that exemption. The effect of such exclusion is simply to reserve such cases for inquiry, according to the directions of the Regulations, whether there is a lawful exemption or not.

The other important Regulation, XIV. of 1825, was made for the purpose of further defining the principles to be followed in determining the force and validity of grants made previous to the *Dewanny*. It enacts and declares, that the power of granting and confirming grants, except by a regular judgment, belongs to the Supreme Government, and all confirmations are invalid, except such as are made by the Governor-General or some Officer expressly authorised to grant or confirm by some competent Court of Judicature or Revenue Board acting in a Judicial capacity, after full investigation in the manner described in the Regulations. Rules are then laid down for the investigation of all claims; one of them is, that *La-khiraj* tenures, of which uninterrupted possession shall have been held exempt from assessment, at and subsequently to the 12th of *August*, 1765, shall be considered to be valid without evidence of any formal grant or confirmation of the same, and shall be continued to heirs in cases in which it may be clearly shown that the right is hereditary, from the nature of the grant or from ancient usage. The proof of possession, and in case of persons not the original grantees, of the hereditary nature of the tenure, is on the parties claiming to hold

the *La-khiraj* property, the general principle being, that the ruling power is interested in a certain proportion of the produce of every *beegah*, except so far as it shall have transferred, relinquished, or compounded its right thereto, and all persons claiming the benefit of such exemptions being bound to establish their respective claims and titles. The result of this is, that the general presumption is to be in favour of the liability, and the claimant of *La-khiraj* is to establish his claim, not by inferences and presumptions, but by the positive proof required by the Regulations. It may appear to be harsh to disregard the presumptions arising from length of time and general conduct, but we have nothing to do with that question, we are bound to act on the principles laid down in these two Regulations, according to that which we deem the true construction.

By them proof is required from the claimant, of a grant made by some one, of lands, to hold in *La-khiraj*, and by hereditary right, prior to the 12th of *August*, 1765, and that possession was *bonâ fide* taken under it, or an enjoyment of lands, as such, and descendible to heirs at and since that time.

Upon the evidence in this case, neither of these claims is made out to our satisfaction: as to the actual grant, there is some proof of one, because though the original, which ought to be in the custody of the claimant (for the title-deeds, were returned to the claimant, in 1795), is not produced, it does appear that it was exhibited before Mr. *Brooke*, in *November*, 1792, and a copy is produced from the records of the Court. The defective register of this, wanting the name of the grantor, and wrong in the name of the grantee, throws some suspicion as to its being a

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genuine deed; but admitting it to be such, the title founded upon the deed is defective on three grounds. First, because the grantee in *La-khiraj*, *Baboo Bejee Chund*, is not proved ever to have been *bonâ fide* in possession after the grant. Secondly, *Raja Tilloh Chund*, the grantor, afterwards, and before the 12th of *August*, 1765, is admitted to have got back the property (whether by purchase or not, or for a full consideration, does not appear), and was sued for the arrears of a charge upon it made by him to the said *Baboo Bejee Chund* in 1762, which became subsequently the subject of a suit, in 1792, by his heir against the heir of *Raja Tilloh Chund*; so the heirs of the grantor and not of the grantee, remained in possession. Thirdly, the grant is stated by the Appellant's *Vakeel*, to have been made to *Manik Chund*, who was the managing *Dewan*, in the name of *Baboo Bejee Chund*, and such a grant bears with it the strongest suspicion of being a fraudulent contrivance, to deprive the ruling power of its lawful share of the revenue, and to be exactly such a transaction, as it was the avowed object of the Regulation to defeat.

We think, therefore, that the claimant's title by the deed is not made out: if the deed had been made *bonâ fide*, the grantee proved to have been in possession, and the grantor proved to have *bonâ fide* purchased afterwards from him the property for a valuable consideration, and so acquired all its rights, the heirs might have been entitled. But there was no such evidence.

The next ground on which the claim is rested, is that of enjoyment, at and from the 12th of *August*, 1765, as *La-khiraj*, which would be a good title, irrespective of the deeds.

Now by the terms of the Regulations, the claimant is to prove this, and the reason he is called upon to give such proof, is, there being a strong presumption against the validity of such titles (as appears by the recitals in the Regulations themselves), and in order to guard the Government against the frauds of its own Officers. It is not enough then for a claimant to say, "You, the Government, could prove the payment of the revenue, if any was paid, and I rely on the absence of your evidence to make out my title, and show that it was not paid." He must show his own title to exemption, and prove by some evidence on his part, that no revenue was collected, and must carry back that evidence to 1765. We should suppose that in the Collector's *Cutcherry* for that District, evidence might be found of the receipt of the revenue, as far back, which might afford an inference of the non-payment for this property. It is clear, however, that the Regulations require the claimant to prove his possession, and it is presumed that the Government would not require a proof which could not reasonably be given, if the exemption was a just and fair one.

Our law affords an analogy to this, in the case of all ancient customs and exemptions, which must have existed from time immemorial; in order to be valid, proof of the customs or exemption for some years back, even twenty, there being no proof to the contrary, would warrant the jury, indeed call upon them, to presume their immemorial existence. But under Lord *Tenterden's* prescription Act, requiring usage for twenty, forty, or sixty years, evidence is always required of the usage, as far back as the commencement of those periods, though it need not be proved for each year.

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There is, in this case, no proof of such possession as is required to be shown on the claimant's part, and the only material evidence to raise the inference of exemption, is the release of the title-deeds, and the giving up the estate in the year 1795, by the Collector. But that does not carry back the evidence of claim for exemption far enough, and it is not clear, that the estate was given up by the Collector because it was *La-khiraj*. Further, if the case is to rest on possession, there must be evidence, that it was an hereditary possession, or possession of exemption, descendible to heirs according to Regulation XIV. of the year 1825, and there is no such evidence, independently of the deed itself, upon which, on account of the suspicions attaching to it, no reliance can be placed.

There Lordships are of opinion, therefore, that the claimant's title is not made out; not on the deed, because the possession of the grantee is not proved, and because there is good ground to believe that the deed was fraudulent; and they think it was not made out independently of the deed, for want of sufficient evidence of the enjoyment of the exemption; certainly for want of sufficient evidence that it was of an hereditary nature: the mere enjoyment in succession, supposing that to be inferred from the evidence, is, by the express terms of the Regulations, not enough.

If the claim cannot be supported, on either of these grounds, it certainly cannot on the ground, that it has been ratified and confirmed by the Government. The transactions in 1795, clearly do not fall within the terms of the Regulation, which does not give the power of confirmation to be exercised in that manner; and

we cannot help thinking, that it would be a strange thing to hold that this order, which, in truth, is the only evidence of enjoyment offered on the claimant's part, and which, by the Regulation, has no direct effect in establishing the exemption, should yet be sufficient evidence for the claimant of every thing necessary to give him a title.

Another objection taken on the part of the Respondent was, that the register was defective. Their Lordships think it possible that the parties gave the best account of the deeds they could; and, therefore, do not think the claim ought to be rejected on that ground.

There remains only to be considered, a question which was raised for the first time, on the argument here, upon the Regulation of Limitation: we have looked through the different Regulations, and have given information to the Counsel upon the different Regulations bearing upon this point, the result of which appears to be, that there is no Regulation of Limitation to a proceeding before the Collector, possibly, (though that matter is very obscure,) there was one as to a proceeding in the *Adawlut* Courts. The learned Counsel will have the goodness to look into that, and if they think anything can be said upon that subject to mention it again. In the meantime our report will be suspended.

The case was afterwards directed to be argued by 18th Feb. 1850.*

* Present: Members of the *Judicial Committee*,—Lord Langdale, Lord Campbell, Mr. Baron Parke, and the Right Hon. T. Pemberton Leigh.

Privy Councillor,—*Assessor*,—Sir E. Ryan, Knt.

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one Counsel on each side, upon the point reserved by the Judgment, namely, whether the right of the Government to assess the villages in question was barred by the clause 2, section 2, of Regulation II. of 1805, by reason of sixty years having elapsed since the right of Government to assess the lands had accrued.

Mr. *Turner*, Q. C., for the Appellant.

The question to be decided upon the reserved point, will be, whether the limitation prescribed by clause 2, section 2, Regulation II. of 1805, applies to proceedings for resumption of lands by the Government, instituted under Regulation II. of 1819, and III. of 1828. We contend that Government is absolutely barred by Regulation II. of 1805, from all proceedings by or before the Collector and Special Commissioner, the lands in question having been held by the Appellant and his ancestors for seventy years, without paying revenue, or any attempt made to charge them with revenue. The cause of action is the non-payment of revenue, and the first step taken was the service of the notice in 1836.—[Mr. Baron *Parke*: It is very extraordinary that this objection was not pleaded in the Courts below.]—It was not pleaded in *India*, but that will not prevent the objection being taken now. By Regulation III. of 1793, sect. 14, the *Zillah* and City Courts in *India* were prohibited from trying the merits of any suit, where the cause of action should have arisen before the 12th of *August*, 1765, or any suit, where the cause of action should have arisen twelve years before the suit should have been commenced for it. From the preamble to this Regulation, it is plain, that the limitation applied not only

to suits between individuals, but also to claims by Government, for assessment of lands; for it recites, that not only shall it apply to all suits between natives, but to the officers of Government employed in the collection of the revenue. Regulation XIX. passed in the same year, however, by section 12, expressly provided, that no period of limitation should bar the claim of Government. This *nullum tempus* clause was afterwards repealed, by clause 2, section 2, Regulation II. of 1805, which, in express and positive terms, limits the claim of Government, whether for the assessment of land, held exempt from the public revenue, without legal and sufficient title to such exemption, or any other public right, to sixty years from the origin of the cause of action. This Regulation is now in force, and we submit, that it applies to the present case, and that it cannot be set aside for the benefit of the revenue any more than the limitation of twelve years could be set aside for the benefit of a private individual. The Regulation refers not merely to the existing jurisdiction of the Civil Courts; but to any other jurisdiction that might afterwards be created for the purpose of determining such cases, and applies to proceedings before the Collector, under Regulation II. of 1819, which puts the Collector's decree upon the same footing as a decree of the Civil Court, and the party aggrieved is to bring his suit in the Civil Court, where his case would be tried by the existing law, of which Regulation II. of 1805, was a part. Regulation III. of 1828, conclusively proves, that the proceedings before the Collector, and subsequently, the Special Commissioner, were entirely judicial. The Regulation of 1805, puts the *Bengal* Government, in respect of their territories, in precisely

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the same position in which the Crown stood in *England*, under the *Nullum tempus* Act, 9 *Geo.* III., c. 16, and limits them to proceed within a period of sixty years for making land liable to public assessment.

It may be urged by the Government, that Regulation XIV. of 1825, shows, that Regulation II. of 1805 was never intended to apply to proceedings similar to this, as the date of the Regulation is within a few days of the period of limitation of sixty years. This Regulation, probably, was intended to apply to life tenures, which would carry the period of limitation far beyond the year 1825.

Mr. *Wigram*, Q. C., for the *Bengal* Government.

The question is narrowed to this point, whether clause 2, section 2, of Regulation II. of 1805, is, in any case, a bar to the claim of Government, except in suits in the ordinary Courts of Civil Justice, and whether it has any application to the summary inquest and proceedings before the Collector authorized by Regulations II. of 1819, XIV. of 1825, and III. of 1828?

The whole argument of the Appellant rests upon the construction to be put upon clause 2, section 2, of Regulation II. of 1805, which he contends applies to the proceedings in question. It is however confidently submitted, that it has no such application: the operation of that Regulation is confined to Civil suits, instituted in the ordinary Courts of Justice, and not to a proceeding like the present before the Collector, investigating the title to exemption from paying revenue, which is purely in the nature of an inquisition and not of a suit. That it is so limited is demonstrated by the Regulations bearing upon this point.

By section 14 of Regulation III. of 1793, the *Zillah* and City Courts in *India* are prohibited from hearing or determining the merits of any suit, where the cause of action accrued before 1765, or where it should have arisen twelve years before the suit was commenced. By Regulation II., section 1, clause first, of 1805, it was declared, that this limitation of twelve years for the commencement of a suit in the Civil Court, was not applicable to any public claims instituted on the part of Government; and by clause second, of the same section, the claim by Government to institute a suit, to be heard, tried and determined in the Courts of Civil Justice, is limited to sixty years. These Regulations were only in force when the Government resorted to the ordinary Civil Courts, under section 12, of Regulation XIX. of 1793, for the prosecution of claims to have lands assessed; but they were not operative in a proceeding instituted before the Collector, under Regulation II. of 1819, which took away the jurisdiction of the Civil Courts of Justice. In none of these Regulations is there to be found any clause limiting the rights of Government; they apply only to the limitation of the remedy. The right is not excluded, the remedy only. *Drummond* v. *The British Linen Company* (*a*).—[Lord *Campbell*: In that case it was a matter of procedure, which was regulated by the *forum*.]—Yes, and the question is the same here, whether the exclusion of the remedy to sue in a Civil Court applies to a summary proceeding by inquest before the Collector, under Regulation II. of 1819, which repealed the Regulations which directed the Collector to sue in the ordinary Courts, and directed him to

(*a*) 10 Bar. & Cr. 903.

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hold an inquisition before himself. Under this Regulation there was a right of appeal to the *Sudder* Court, but by Regulation III. of 1828, the cognizance of appeals from the decisions of the supreme revenue authorities in respect to resumption of *La-khiraj* tenures were entirely taken away from the regular Courts, and vested in Special Commissioners, to be appointed by the Governor-General in Council. The proceedings in the Collector's Court has no analogy to suits in the Courts of Civil Justice; and it would seem that with the substitution of this inquisition before the Collector, the omission of any limitation of time to sue by the Regulations creating this mode of trying revenue suits, was not *casus omissus*, but from its very nature was intentional.

This construction removes the difficulty which otherwise would arise from the date of Regulation XIV. of 1825. It is highly improbable, that in *May*, 1825, just as the sixty years were running out from the 12th of *August*, 1765, a Regulation should be passed which would be inoperative before it could reach the Province where it was to be administered. It does not admit of the construction put by the Appellant, that it might have been intended to apply to life tenures, and that the period of limitation would not begin to run till the expiration of the life tenure. Regulation XIV. of 1825, clause 2, section 3, plainly shows, that it will not admit of such an interpretation, as it applies only to *La-khiraj* tenure, that is, hereditary, according to the ancient usage of the country, and to no other tenures. At all events, the cause of action arose only from the date of Regulation XIX. of 1793, and the limitation has not expired. It is, however, submitted upon this point, that it is certainly too late to set up Regulation II.

of 1805, as a bar to the Government's claim to resume by reason of sixty years having elapsed. If a Defendant claims the privilege of the Statute of Limitation, it lies upon him to show that the Plaintiff is excluded. Here the Appellant had plenty of opportunity of raising this bar to the right to resume the villages before the Collector's Court. He objected to the jurisdiction, but did not take this point, neither did he urge it as a ground of appeal before the Special Commissioners, nor did he in his appeal case, before this Court, insist upon it, as a ground of defence; he must, therefore, be considered as waiving any objection which he could have pleaded under this Regulation.—[Baron *Parke*: Has Regulation II. of 1805, ever been applied in *India* in proceedings before the Collector and Special Commissioner in a case like the present?]—No Regulation is more familiarly known in *India* than this, and yet, as far as we can learn, it never was attempted, in proceedings before the Collector, to plead the same in bar to an inquiry like this. The burthen is upon the Appellant to show, that the claim had not accrued within sixty years. What is there to show that revenue has not been received by Government within that period? Again, the view taken by your Lordships' judgment upon the merits is material, and may possibly render it unnecessary to decide the question whether this Regulation applies. The judgment declares, that "the deed of grant under which the Appellant claims, bears with it the strongest suspicion of being a fraudulent contrivance, to deprive the ruling power of its lawful share of the revenue, and to be exactly such a transaction as it was the avowed object of the Regulation to defeat." By clause 4, of section 3, of this Regulation, no prescriptive right of property is

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to be established, when the occupancy shall not have been under a *bonâ fide* title. So, although there is an express limitation made by Regulation II. of 1805, yet it expressly provides, that the limitation shall not apply in any case where the party shall not have been in possession under a *bonâ fide* title. This was not a *bonâ fide* possession, and that furnishes a conclusive answer to the defence of possession under the Regulation.

The Right Hon. T. PEMBERTON LEIGH:

21st June, 1851.

This is an appeal from a decision of the Special Revenue Commission of *Bengal*, on the subject of the assessment of certain estates of the Appellant to the public revenue.

Various grounds of objection were taken to that decision, all of which were disposed of by their Lordships, at a former sitting, but one question was reserved, which appeared to arise incidentally in the course of the discussion, namely, that the claim of the Government of *Bengal* was barred, by what we should call the Statute of Limitations, by the lapse of the period of sixty years. It appears to their Lordships, that the claim would be barred by the lapse of that period, in this case, unless the case can be taken out of the operation of the Regulation of Limitation upon either of the two grounds stated in the argument, on the part of the *Bengal* Government.

It was said first, that the limitation which is contained in the Regulation of 1805, does not apply, because it refers to Courts of Civil Justice: that is very true, but it is quite clear, that the principle of that Regulation would be rendered wholly nugatory, unless it were extended to the case which is now before their Lordships, in which the Collector's Court must be considered for this purpose a Court of Civil Justice. It

is the only mode in which the question could arise. Their Lordships are, therefore, of opinion, that there is nothing in that ground of exception.

The more important matter was, that the point does not appear to have been raised in the Courts below, and is not distinctly stated in the printed cases here. It was suggested that there may be circumstances which are not known to us, which may prevent the application of a law which apparently is distinctly applicable to the case.

Now, in the first place, the proceedings in the case were not proceedings in a regular suit. There were no pleadings, and, therefore, it would be rather hard to bind the parties by an objection of so technical a nature, especially if on investigation it is found to have a valid ground of defence. But since this case was heard, we have had produced to us a copy of a judgment pronounced a twelvemonth after the decision of this case in the Court below (*a*), in which it was held, that the

(*a*) After the case had been argued upon this reserved point, and before final judgment was delivered, the Appellant's Counsel handed in to their Lordships a copy of a case, No. 405. Appeal, *La-khiraj*, heard before the Special Commissioner, at *Moorshedabad*, on the 31st of *December*, 1838. This case was extracted from the Calcutta Monthly Journal, Vol. V. Pt. I. (1839), p. 61 : the material part, relating to the operation of Regulation II. of 1805, sec. 2, as a bar to the claim of Government, was as follows :—

" The Appellants have filed a deed under seal of the *Khalsa* or *Dewannee*, and the signature of the President of the Committee of Revenue, *H. Cotterell*, proving possession of their *La-khiraj* land, dated 5th *July*, 1775, and which had been duly registered and countersigned by *H. Vansittart*, Persian translator of that Office. The period limited by the Regulation now in force for prosecution, in such cases, on the part of the Government ended, and the right to institute a suit to assess the land, lapsed on 5th *July*, 1835. Whereas this prosecution was not commenced till 16th *September*, 1836, or four-

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Regulation did apply to a case similar to that now before this Court.

Upon the whole, therefore, their Lordships are of opinion, that upon these grounds they must reverse the judgment which has been pronounced by the Special Commissioner, but under all the circumstances they think there should be no costs given either in this Court or in the Court below.

teen months and eleven days after the expiration of the limitation fixed by Regulation II. of 1805. The Government pleader wished to make the institution of the suit date from 1st of *May*, 1793, that is to say, from the institution of Regulation XIX.; but this cannot be admitted. Regulation XIX. of 1793, was not the commencement of a suit to be 'heard," tried, and determined; but the enactment of trying the validity of claims, and declaring what should be valid and what invalid; and that Regulation, moreover, contained a section (twelve) especially providing that no period of limitation shall bar the claim of Government; but this section has been repealed by Regulation II. 1819, section 2, clause 2, and since which it is no longer 'in force,' as required by clause 2, section 2, Regulation II. 1805; from the time of which enactment, the limitation of sixty years by the latter Regulation for Government claims comes into force generally instead of it, takes its place, and cannot be set aside for the benefit of the revenue, any more than the bar of twelve years could be set aside for the benefit of a private individual.

"Now the cause of action in this case, is the non-payment of revenue. This bar existed more than sixty years at the time the first notice, in this case, was served; the limitation fixed has been passed, and the claim has lapsed. I, therefore, reverse the Collector's decision."

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ACTION.

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Held, that an action would lie by the mortgagee against the mortgagor for recovery of the principal and interest money advanced. [*Raja Oodit Purkash Sing* v. *Martindell*] 444

ADOPTION.

(HINDOO.)

1. Review of the Hindoo Law, relating to the validity of a second adoption, by a Hindoo, during the lifetime of the first adopted son.

V., a *Zemindar* in the Northern Circars at *Madras*, of the *Soodra* caste, being childless, adopted, with the consent of his wife, a son, J. At the time of this adoption, he executed a deed with the natural father of J., by which he undertook to make him heir to his *Zemindary* and wealth. V. subsequently married a second wife, and during the lifetime of his adopted son, J., adopted a second son, R. Both these adopted sons lived in V.'s house, who, while they were minors, made a division of his ancestral and other estate, between them, in certain proportions. J., when he came of age, entered into possession of his share: but R., being a minor, V. managed his share for him, and died during his minority. At V.'s death, J. claimed the right of succession to the whole of V.'s estate and property, insisting, that V. was precluded from alienating any portion of the estate, to his, the first adopted son's, prejudice; and

that the adoption of R. during his lifetime, was illegal and void. The *Sudder Dewanny Adawlut* at *Madras* decided that the second adoption was valid., Held, upon appeal, by the Judicial Committee of the Privy Council, reversing that decree :—

First. That, according to the Hindoo Law, a second adoption of a son, the first adopted son being alive, and retaining the character of a son, was an illegal and void act.

Secondly. That J.'s acquiescence in the division, after he came of age, did not preclude his right to recover the ancestral estates, as V. had no power to alienate any portion of the ancestral estate to J.'s prejudice. But

Thirdly. That (upon the principle that a party cannot affirm and disaffirm the same transaction) effect must be given to the intentions of V., so far as V. had power of disposing of his property, by an act, *inter vivos*; and in which J. had acquiesced; and that as J. took the whole of the ancestral property of V., he must give up for the benefit of R. that part of V.'s other property, included in his share in the division, and to give effect to which his consent was not necessary.

Among the *Soodras*, a childless Hindoo may adopt a son from a *gotrum* different from his own.

The consent of a wife to the adoption of a son, by her husband, a childless Hindoo, is not essential to the validity of the adoption. Adoption is the act of the husband alone; although the wife may join in it.

Upon a disputed question of adoption, the Provincial Court, and the *Sudder* Court, on appeal, held that the evidence was not sufficient to establish the fact of adoption. Such decision reversed by the Judicial Committee. [*Rungama* v. *Atchama*] 1

2. Adoption may be made, either by a man in his lifetime, or by his widow, after his death, under a power conferred on her for that purpose by her husband.

Where there is conflicting evidence upon the fact of an adoption, much will depend upon the probabilities of the case, to be collected from facts as to which both parties are agreed.

As, in the case of a childless Hindoo, advanced in years, where it was in the highest degree improbable that he could have any children by his wives, and he had adopted a boy, in despair of having issue, who died in his adoptive father's lifetime, and the fact of his religious tenets, by which his salvation depended upon his leaving a son to perform his funeral oblations,—

Held to be strong probabilities in favour of such an adoption.

The evidence of witnesses to the fact of a parol adoption, without deed, was contradictory: the Provincial and *Sudder* Courts in *India*, held, that a claimant to the succession, as adopted son, had not established, by creditable testimony, the fact of such adoption. Upon appeal, such Decrees reversed; the Court holding, that the presumption, in the

circumstances, was in favour of adoption, and that the evidence was sufficient to establish the claimant's title. [*Huradhun Moorkvrjia* v. *Muthoranath Mookurjia*] - - 414

ADVOCATE GENERAL.

By the 53rd *Geo.* III., c. 155, sec. 111, the Advocate-General (*Madras*) is entitled to appear and represent the Crown, in informations for the administration of charitable funds. [*Att.-Gen.* v. *Brodie*] - - 190

AGREEMENT.

1. By deeds of *farigh-kutti* (release) and *ikrar-nama*, (acknowledgment) entered into by parties to a suit then pending, a compromise was agreed upon, in consideration of Rs. 2,000, to be paid by the Defendants to the Plaintiff, the Plaintiff undertaking to execute and deliver in to the Court a deed of *razi-nama* which the Plaintiff afterwards refused to execute: Held by the Judicial Committee of the Privy Council, affirming the *Sudder* Court's decree, that the deeds of *farigh-kutti* and *ikrar-nama* constituted a binding obligation on the Plaintiff, and that he could not avoid the compromise, by refusing to execute and enter up the *razi-nama*.

The Plaintiff instituted the suit *in formâ pauperis*, and by the terms of the deed of compromise, the Defendants undertook to pay the costs, upon his entering up the *razi-nama*. The Courts in *India* sustained the compromise, and decreed the Plaintiff to pay out of the consideration money to be received by him, the costs subsequent to the deeds of compromise. Such decree affirmed on appeal. [*Munni Ram Awasty* v. *Shee Churn Awasty*] - - 114

2. In a suit for mesne profits of lands purchased by the Plaintiff from the Defendant, the Defendant pleaded, in bar to the action, a deed of agreement, containing a condition, that the Plaintiff (pending a suit then lately brought by the Defendant for recovery of the lands in question, and until his name was entered in the Collector's books) should have no claim to the profits. The *Zillah* and *Sudder* Courts in *India*, discredited the oral testimony, and declared the deed to be a forgery. Upon appeal, these decrees were reversed; the Judicial Committee, upon the evidence and probabilities of the case, being of opinion, that the circumstance of the vendor not being in possession of the lands at the time of the purchase, and that a suit was depending at the time to recover possession, and taking into consideration the length of time that had elapsed before the Plaintiff made his demand, were, coupled with the evidence produced, sufficiently strong facts in favour of the deed of agreement. [*Mudhoo Soodun Sundial* v. *Suroop Chunder Sirkar Chowdry*] - - - - - - - 431

3. A. sued B., a debter of his intestate, upon a bond debt, and obtained

a decree against him for the amount. B. appealed from this decree to the *Sudder* Court. By a deed of arrangement entered into by A. and C., after the commencement of the suit, C. became entitled to a six-*ana* share of the debt. Pending the appeal to the *Sudder* Court, A. entered into a compromise with B., postponing the payment of the amount recovered by the decree, for three years, and foregoing altogether interest upon the principal. This was done without the privity or consent of C. B. failed to pay the amount within the stipulated time, and proceedings were taken by A. against him, but he had not realised the amount of the decree. In a suit by C. against A. to make him chargeable for the six-*ana* share in the decree, the *Sudder* Court held that A. was chargeable to C. for such share, with interest. Upon appeal, such decree reversed; the Judicial Committee holding, that A. must be treated as a trustee for C., and that in the absence of fraud upon the *cestui que trust* in executing the compromise, or that it was not beneficial for all parties, he was responsible only to C. for such amount of the debt as had been recovered, or without his wilful default might have been recovered. [*Doorga Persad Roy Chowdry* v. *Tarra Persad Roy Chowdry*] - - - - - - - 452

ALLUVION.

Alluvial lands which are gradually gained from the river, belong, by way of accretion, to the lands of the adjoining proprietor. [*Mussumat Imam Bandi* v. *Hurgovind Ghose*] 403

ANCESTRAL ESTATE.

See "ADOPTION," 1.
"CONFISCATION."

APPEAL.

1. *Semble.*—Although the Courts in *India* admit a party to appeal to *England, in formâ pauperis*, yet the Appellant ought to make a special application to the Queen in Council, for leave to prosecute such appeal, *in formâ pauperis*. [*Munni Ram Awasty* v. *Sheo Churn Awasty*] 114

2. No appearance having been entered by the Respondents, to an appeal from *India*, and the Appellant's case being ready to lodge for hearing, their Lordships, upon the application of the Appellant, made an order, that the Respondents should be served with notice, that unless they brought in their case without delay, the appeal would be heard *ex parte*; giving the Appellant liberty to proceed in the Court below, to render such service effectual; and the Court was ordered to certify to the Judicial Committee, what had been done with respect to the same [*Wise* v. *Kishenkoomar Bous*] 201

3. Their Lordships declined to hear

an appeal, from the *Sudder Dewanny* at *Madras, ex parte*, without evidence of the Respondent having been personally served with notice, that the appeal was pending; and ordered the appeal to stand over, with leave for the Appellant to proceed in the Court below, to render service of such notice effectual. [*Konadry Valabha* v. *Valia Tamburati*] - 213

4. An order, made by the Judges of the Supreme Court of *Madras*, dismissing the Master of that Court from his office, for alleged official misconduct, in the taxation of a bill of costs, being made by the Court at its own instance, is not an appealable grievance, within the *Madras* Charter of Justice of *December*, 1800.

An appeal having been allowed by the Court below, and referred by Her Majesty to the Judicial Committee for adjudication in the ordinary way, their Lordships, though of opinion that there existed no Charter right of appeal, thought it a fit case for the allowance of a special appeal; and having heard the case upon the merits, directed a petition for special leave to appeal to be presented to Her Majesty; which on being referred to them, they recommended the allowance thereof, and that the appeal be placed in the same plight and condition as that originally referred to them. [*In re Minchin*] 220

5. The Supreme Court, in overruling an objection to the jurisdiction of the Court, refused leave to appeal; the subject-matter of the action being trifling, and under the amount required by the rules of the Privy Council. Upon Petition, the Judicial Committee granted leave to appeal, but upon terms of the Appellant paying the Respondent's costs of the appeal, to enable him to appear, to prevent the question being argued *ex parte*. [*Spooner* v. *Juddoo*] - - - - - - - 354

BILL OF SALE.

See "TROVER."

BOMBAY CHARTER.

See "JURISDICTION," 2.

BOUNDARIES.

Lands having been submerged, by a change of the course of the river *Ganges*, after several years, re-appeared. Upon a disputed question of right to such lands, by two adjoining proprietors, each claiming the lands to be part of his *mouza*, the *Sudder* Court held the Plaintiff's claim to be barred, first, by the *Bengal* Regulations of Limitation, from lapse of time; and secondly, that the lands were alluvial and attached to the *mouza* of the Defendant. Such Decree, upon appeal, reversed, the Judicial Committee holding—

First, that the question of Limitation not having been put in issue by the pleadings, could not be allowed to operate upon the case; and

Secondly, that the Court had mis-

taken the question, in supposing it one of alluvion, the point at issue being one of boundary only, and that the Plaintiff had made out his title to possession. [*Mussumat Imam Bandi* v. *Hurgovind Ghose*] - 403

BRITISH SHIP.

See "SHIP REGISTRY ACT."

CHARITIES.

See "ADVOCATE GENERAL."
"JURISDICTION," 1.

CHARTERS.

See "Appeal," 4.
"JURISDICTION," 1, 2.

COMPROMISE.

See "AGREEMENT," 1, 3.

CONFISCATION.

A., the proprietor of large ancestral and other estates in *Benares*, died, leaving a widow and four sons. Shortly after A.'s death, three of the brothers became implicated in a rebellion against the State The fourth brother, then a minor, was not concerned in the rebellion. At the suppression of the rebellion, Government issued proclamations for the parties severally to appear and answer the charges against them; but they absconded: the Government thereupon, acting under the provisions of *Bengal* Reg. XI. of 1796, confiscated the whole of their property, including the ancestral estates, formerly held by A.

Held, on appeal, that such confiscation was regular, and within the meaning of the Regulation, but that the act of Government, which divested the three sons of their right and interest in the estates, did not affect the rights of the fourth son, who was entitled to his share in all the ancestral estates of A., taken by the Government, under the forfeiture; and

Held also, that the forfeiture did not affect the rights of A.'s widow, and that she was entitled to maintenance, out of the whole of the estate that was ancestral. [*Mussumat Golab Koonwur* v. *The Collector of Benares*] - - - - - - 246.

CONFLICT OF LAWS.

See "HINDOO LAW."

CONVERSION.

See "TROVER."

COURT.

1. The Supreme Court at *Madras* has an equitable jurisdiction over charities. [*Att.-Gen.* v. *Brodie*] - 190

2. The Supreme Court at *Bombay* is prohibited by the Charter of 1823, from entertaining any jurisdiction in any matter concerning the revenue under the management of the

Governor and Council, or any act done in the collection thereof. [*Spooner v. Juddoo*] - - - 353

3. The Courts of the Revenue Collector, and the Special Commissioner, appointed under Regs. II. of 1819, and III. of 1828, are Courts of Civil Justice within the meaning of the Regulations of Limitation. [*Maha Raja Dheeraj Raja Mahatab Chund Bahadoor* v. *The Government of Bengal*] - - - - - 466

See "JURISDICTION."

CROWN.

Right of the Advocate-General to appear for, in informations for administration of Charities. [*Att.-Gen.* v. *Brodie*] - - - - - - 190

CONSTRUCTION.

The Statute 8 & 9 *Vict.*, c. 109, amending the law relating to games and wagers, does not extend to *India*. [*Ramloll Thackoorseydass* v. *Soojumnull Dhondmull*] - - - - 339

Where mortgage property is situate in two districts, an order made by the Judge of one district for foreclosure of the whole of the mortgaged property is a sufficient compliance with *Ben.* Reg XVII. of 1806, sec. 8. [*Ras Muni Dibiah* v. *Pran Kishen Das*] - - - 392

COSTS.

See "AGREEMENT," 1.

CUSTOM.

See "HINDOO LAW."

DAMAGES.

Damages assessed at a gross sum by the Judicial Committee, no sufficient evidence being furnished in the cause, to calculate the exact amount of the loss sustained. [*Raja Burdakanth Roy* v. *Aluk Munjooree Dassiah*] - - - - - - - 321

DIVISION.

See "ADOPTION," 1.
"GIFT," 1.

EVIDENCE.

See "ADOPTION."
"AGREEMENT," 2.
"PRACTICE," 7.
"RESUMPTION."

EXPECTANT INTEREST.

See "GIFT."

FORECLOSURE.

See "MORTGAGE," 1.

FORFEITURE.

See "CONFISCATION."

FORMÂ PAUPERIS.

See "AGREEMENT," 1.
"PRACTICE," 1.

GAMING.

See "WAGER."

GIFT.

1. Effect given to an instrument, in the nature of a testamentary disposition, made by a Hindoo, domiciled in the North-West Provinces of *Bengal*.

By this instrument, the Testator gave his widow a life estate in all his property, and after her decease he gave a moiety thereof to his brother B., and his sons C. and D. B. and C. died in the lifetime of the tenant for life. C. and D. were divided brothers. C.'s widow claimed his share. Held by the Judicial Committee :—

1. That C. and D. took vested interests in the moiety as tenants in common, the actual enjoyment of the expectant interest being postponed till the termination of the life estate.

2. That, in such circumstances, it was not necessary that C.'s share should be reduced into possession, during his lifetime, to enable his widow to succeed to it.

Semble.—That the instrument itself would have operated as a division of the property given, so as to prevent D., who survived, succeeding to his deceased brother's share, as an undivided brother. [*Rewun Persad* v. *Mussumat Radha Beeby*] 137

2. A deed of gift of *Zemindary*, to a stranger, by the widow of the *Zemindar* last seised, who died without issue, which gift was made with the confirmation of the *Bandhus*, the mother's brother's sons, the heirs. Held to be valid by the *Daya-bhaga Sastras*, as against a party claiming the succession, according to the *Mitacshara*, as being descended in the seventh remove, in the male line, from the common ancestor. [*Rany Srimuty Dibeah* v. *Rany Koond Luta*] - - - 292

HEARING, *ex parte*.

See "PRACTICE," 2, 3.

HINDOO LAW.

1. The title to land in *Poornea*, being in dispute, upon the question, whether the *Mythila* or *Nuddea* law was to regulate the succession, the test to be applied is, the form and character of the religious rites and ceremonies, and the usages of the family.

Where, therefore, a family of *Bengali Soodra Sutgops*, who had migrated, at a remote period, from the south-west of *Bengal*, where the *Nuddea* law prevailed, to the district of *Poornea*, where the *Mythila* law was in force, and had adopted and performed their religious rites and ceremonies, according to the law of *Mythila*,—it was held by the Judicial Committee, affirming the decree of the *Sudder* Court, that the *Mythila* law, in such case, must govern the right of succession. [*Rany Padmavati* v. *Baboo Doolar Sing*] - - - - - - - - 259

2. Upon a claim to the inheritance of a *Zemindary*, situate in *Midnapore*, which had been in possession, for a long period anterior to the institution of the suit, by a family of

Satgop Brahmins, who had migrated from *Bengal* to *Midnapore*, but had retained their laws and performed their religious ceremonies, according to the *Daya-bhaga* and other authorities in force in *Bengal*;—It was held by the Judicial Committee, affirming the judgment of the *Sudder* Court, that the *Daya-bhaga* authorities must govern the descent, and not the *Mitacshara* which prevailed in *Midnapore*. [*Rany Srimuty Dibeah* v. *Rany Koond Luta*] - - - - - 292

See "GIFT."

INHERITANCE.

See "HINDOO LAW."

JOINT-TENANCY.

See "GIFT," 1.

JURISDICTION.

1. The Supreme Court at *Madras* (established by the *Madras* Charter of 1800) has an equitable jurisdiction, similar to, and corresponding with, the equitable jurisdiction exercised by the Court of Chancery in *England*, over charities. [*Att.-Gen.* v. *Brodie*] - - - - 190

2. By the Charter of Justice of the 23rd of *December*, 1823, establishing the Supreme Court at *Bombay*, that Court was prohibited (in like manner as the Supreme Court at *Calcutta*, under the 21st *Geo.* III., c. 70, s. 8) from entertaining any jurisdiction in any matter concerning the revenue, under the management of the Governor and Council, or any act done in the collection thereof.

In an action of trespass brought against the Collector of revenue at *Bombay*, for distraining for arrears of Government "quit-rent," the Defendant pleaded "Not guilty" only. The Supreme Court at *Bombay* held, that the "quit-rent" was not "revenue" within the meaning of the Charter, and that the act complained of, was not warranted by the usage of the country and the Company's Regulations, and that the Court had jurisdiction to entertain the action; and found for the Plaintiffs.

Held, reversing such finding and judgment,—

First, that the "quit-rent" was part of the "revenue" of the East India Company at *Bombay*; and

Secondly, that it being a matter concerning the revenue, and the collection thereof, the Supreme Court had no jurisdiction, and that the Court being excluded by the Charter from any matter concerning the revenue, the plea of "Not guilty" was sufficient, and that the Judge ought, at the trial, to have directed a nonsuit, or a verdict to be entered for the Defendants. [*Spooner* v. *Juddow*] - - - - - 353

LA-KHIRAJ.

See "RESUMPTION."

LEASE.

Lease for a term of years of a *per-*

gunna in *Bengal*, to A., to which B. became surety for the due performance of the conditions, and afterwards a co-partner with A. in the lease. Before the expiration of the demised term, the representations of the lessors evicted the lessee from the *perguxna*. Held, that a suit would lie by B.'s representatives against the lessors' representatives, for ouster from the lease, although they were not parties to the contract with the original lessors. [*Raja Burdakanth Roy* v. *Aluk Munjooree Dasiah*] 321

See "DAMAGES."
"USURY."

LIMITATION OF SUIT.

1. A question of limitation not having been put in issue by the pleadings, cannot be allowed to operate upon the case. [*Mussumat Imam Bandi* v. *Hurgovind Ghose*] - - - 403

2. The right of Government to institute proceedings by or before the Revenue Collector, under Reg. II. of 1819, for the resumption of lands for the purpose of assessment to the public revenue, is barred by Reg. II. of 1805, sec. 2, cl. 2, after the lapse of 60 years from the cause of action.

So held by the Judicial Committee of the Privy Council, on appeal from a decree made by the Special Commissioner, upon a claim by Government, where *Mahoteran* lands were held as *La-khiraj* by the *Raja* of *Burdwan*, before the Company's accession to the *Dewanny* in 1765, and no claim had been made by Government to resume the lands for assessment till the year 1836.

The Courts of the Revenue Collector and the Special Commissioner, appointed under Regs. II. of 1819, and III. of 1828, are Courts of Civil Justice within the meaning of the Regulations of Limitation.

An objection raised the first time at the hearing of the appeal before the Privy Council, that the Government's right to sue was barred by the Regulation of Limitation, II. of 1805, from lapse of time, sustained; the proceedings in *India* before the Revenue Collector and Special Commissioner under Regs. II. of 1819 and III. of 1828, not being in the nature of a regular suit. [*Maha Raja Dheeraj Raja Mahatab Chund Bahadoor* v. *The Government of Bengal*] - - - 466

MADRAS CHARTER.

See "APPEAL," 4.
"JURISDICTION," 1.

MINOR.

See "CONFISCATION."

MORTGAGE.

1. In the case of a mortgaged *Zemindary*, partly situated in two separate districts—Held that an order, made by the Judge of the Civil Court of one district, for foreclosure of the whole of the mortgaged property, was a sufficient compliance

with the provisions of *Bengal* Reg. XVII. of 1806, sec. 8, as to give the Civil Court of that district jurisdiction to entertain a suit relating to the whole property comprised in the mortgage, and to decree a foreclosure.

The mortgagor, by deed, authorised his widow to adopt a son. After his death his widow exercised the power, and adopted a boy, a minor, who became by the Hindoo law, the legal representative of the deceased. The order for foreclosure was served on the widow only. Held, further, that, as the widow had a life interest, and was also guardian of the minor, such service was sufficient. [*Ras Muni Dibiah* v. *Pran Kishen Das*] - - 392

2. A deed of mortgage and conditional sale, contained a covenant for possession by the mortgagee during the mortgage term. Possession was withheld though the mortgagor received the mortgage money. Held, that an action would lie by the mortgagee against the mortgagor, for recovery of the principal and interest-money advanced. [*Raja Oodit Purkash Sing* v. *Martindell*] - - - - - - 444

NOTICE.

See "PRACTICE," 2, 3.

OFFICIAL PERSON.

If a party *bonâ fide*, and not absurdly, believes that he is acting in pursuance of a Statute, he is entitled to the special protection which the Legislature intended for him, although he has done an illegal act. [*Spooner* v. *Juddoo*] - - - 353

ONUS PROBANDI.

See "RESUMPTION."

"TITLE."

OPIUM.

(Time bargain.)

See "WAGER."

OUSTER.

See "LEASE."

PARTITION.

See "ADOPTION," 1.

"GIFT," 1.

PARTNER.

See "LEASE."

PLEADING.

A plea in abatement to the jurisdiction of the Court must point out another Court before which the matter is cognizable. A plea in bar, if well founded, is sufficient, without pointing out the Court in which the suit ought to have been brought. [*Spooner* v. *Juddoo*] 353

See "JURISDICTION," 2.

"PRACTICE," 8.

POSSESSION.

An order, giving possession of lands,

made by the *Foujdarry* (Police Magistrates) Court, upon a charge of a breach of the peace, coming before the Magistrate, is not a determination respecting the rights to such lands. [*Mussumat Imam Bandi* v. *Hurgovind Ghose*] - 403

See "TITLE."

PRACTICE.

1. *Semble.*—Although the Courts in *India* admit a party to appeal to *England, in formâ pauperis*, yet the Appellant ought to make special application to the Queen in Council, for leave to prosecute such appeal *in formâ pauperis*. [*Munni Ram Awasty* v. *Sheo Churn Narain*] 114

2. No appearance having been entered by the Respondents, on an appeal from *India*, and the Appellant's case being ready to lodge for hearing, their Lordships, upon the application of the Appellant, made an order, that the Respondents should be served with notice, that unless they brought in their case without delay, the appeal would be heard *ex parte*; giving the Appellant liberty to proceed in the Court below, to render such service effectual; and the Court was ordered to certify to the Judicial Committee what had been done with respect to the same. [*Wise* v. *Kishenkoomar Bous*] 201

3. Their Lordships declined to hear an appeal from the *Sudder Dewanny* at *Madras*, *ex parte*, without evidence of the Respondent having been personally served with notice, that the appeal was pending; and ordered the appeal to stand over, with leave for the Appellant to proceed in the Court below, to render service of such nature effectual. [*Konadry Valabha* v. *Valia Tamburati*] - - - - - - 218

4. An order made by the Judges of the Supreme Court of *Madras*, dismissing the Master of that Court from his office, for alleged official misconduct, in the taxation of a Bill of costs, being made by the Court at its own instance, is not an appealable grievance within the *Madras* Charter of Justice of *December* 1800.

An appeal having been allowed by the Court below, and referred by Her Majesty to the Judicial Committee for adjudication in the ordinary way, their Lordships, though of opinion that there existed no charter right of appeal, thought it a fit case for the allowance of a special appeal, and having heard the case upon the merits, directed a petition for special leave to appeal to be presented to Her Majesty, which, on being referred to them, they recommended the allowance thereof, and that the appeal be placed in the same plight and condition as that originally referred to them. [*In re Minchin*] - - 220

5. Damages assessed at a gross sum by the Judicial Committee, no sufficient evidence being furnished in the cause to calculate the exact amount of the loss sustained.

[*Raja Burdakanth Roy* v. *Aluk Munjooree Dasiah*] - - - 321

6. The Supreme Court, in overruling the objections to the jurisdiction of the Court, refused leave to appeal; the subject-matter of the action being trifling, and under the amount required by the rules of the Privy Council. Upon Petition, the Judicial Committee granted leave to appeal, but upon terms of the East India Company paying the Respondent's costs of the appeal, to enable him to appear to prevent the question being argued *ex parte*. [*Spooner* v. *Juddoo*] - - - 353

7. Where the point at issue is a question of fact only, there is a strong presumption in favour of the judgment of the Court below, as the Judges in *India* possess advantages in forming an opinion of the probability of the transaction, and, in some cases, of the credit due to the witnesses; but that does not relieve the Court of the last resort, from the duty of examining the whole evidence, and forming its opinion upon the whole case. [*Juddoo Soodun Sundial* v. *Suroop Chunder Sirkar Chowdry*] - 431

8. An objection, raised for the first time at the hearing of the appeal before the Privy Council, that the Government's right to sue was barred by the Regulation of Limitation II. of 1805, from lapse of time, sustained; the proceedings in *India* before the Revenue Collector and Special Commissioner under Regs. II. of 1819, and III. of 1828, not being in the nature of a regular suit. [*Maha Raja Dheeraj Raja Mahatab Chund Bahadoor* v. *The Government of Bengal*] - - 466

PUBLIC OFFICER.

An order made by the Judges of the Supreme Court of *Madras*, dismissing the Master of that Court from his office, for alleged official misconduct in the taxation of a bill of costs, reversed upon appeal, by the Judicial Committee of the Privy Council. [*In re Minchin*] 220

See "OFFICIAL PERSON."

PUBLIC POLICY.

See "WAGER."

RAZI-NAMA.

See "AGREEMENT," 1.

REDUCED INTO POSSESSION.

See "GIFT."

REGISTRATION.

See "SHIP REGISTRY ACT."

RELIGIOUS CEREMONIES.

See "HINDOO LAW."

REGULATIONS.

See "CONFISCATION."
"LIMITATION OF SUIT," 2.
"MORTGAGE," 1.
"PRACTICE," 8.
"RESUMPTION."
"USURY."

RESUMPTION.

The right of Government to institute proceedings by or before the Revenue Collector, under Reg. II. of 1819, for the resumption of lands for the purpose of assessment to the public revenue, is barred by Reg. II. of 1805, sec. 2. cl. 2, after the lapse of 60 years from the cause of action. So held by the Judicial Committee of the Privy Council, on appeal from a decree made by the Special Commissioner, upon a claim by Government, when *Mahoteran* lands were held as *La-khiraj* by the *Raja* of *Burdwan* before the Company's accession to the *Dewanny* in 1765, and no claim had been made by Government to resume the lands for assessment till the year 1836.

The exclusion of lands, as *La-khiraj*, from the Decennial and Permanent Settlements, is of no weight, *per se*, as evidence of exemption to resumption under Reg. XIX. of 1793.

The general presumption is in favour of the liability to assessment of land, and by Regs. XIX. of 1793 and XIV. of 1825, the *onus probandi* lies on a claimant to *La-khiraj*, to establish his title to exemption, not by inference but by positive proof by a grant, to hold as *La-khiraj*, or by a proprietary right, prior to the grant of the *Dewanny* (12th of *August*, 1765), and that the possession was *bond fide* taken under it, or an enjoyment of lands as such, and descendible to heirs at or since that time. *Maha Raja Dheeraj Raja Mahatab Chund Bahadoor* v. *The Government of Bengal*] - - 466

REVENUE.

The mere circumstance that a wager concerns the public revenue or creates a temptation to do wrong will not render it illegal. [*Ramloll Thackoorseydass* v. *Soojumnull Dhondmull*] - - - - - 339

See "RESUMPTION."

SERVICE (of Notice in *India*).

See "PRACTICE," 2, 3.

SHIP REGISTRY ACT.

A ship built in a foreign port in *India*, in 1817, within the limits of the Company's Charter, by foreigners, and which sailed under foreign flags, until 1838, when it was then and thereafter owned by, and belonged to, British subjects, resident at *Bombay*, is entitled, under the Proclamation of the Governor-General in Council, and the Act of the Legislative Council of *India*, No. X. of 18-, (passed in pursuance of the power granted by the Statute, 3 & 4 *Vict.*, c. 56,) to be registered at *Bombay*, as a British ship, for the purposes of trade, within the limits of the Company's Charter. [*Crawford* v. *Spooner*] - - - - - - - - 179

STATUTES.

3 & 4 *Vict.*, c. 56. *See* "SHIP REGISTRY ACT."

8 & 9 *Vict.*, c. 109. *See* "WAGER."

SUCCESSION.

See "HINDOO LAW."

TIME BARGAIN.

See "WAGER."

TITLE.

1. A., being in possession of lands, as purchaser, under deeds of sale from B., the person last seised, was forcibly ousted from possession by C. and D., who set up a title to the lands, under an alleged deed of gift from B. A. made a complaint to the *Foujdarry* (Criminal) Court, and, under an order of that Court, was again put into possession; C. and D. being directed to institute a suit in the Civil Court, to establish their claim, which they accordingly did, relying upon their title, and impeaching the deeds of sale. In such circumstances, held by the Judicial Committee, reversing the decree of the *Sudder Dewanny Adawlut* of *Bengal* (without prejudice, however, to any question which might arise between A. and any other party claiming under B.), that it was incumbent on C. and D. to prove their right to the lands claimed, before they could put A. to proof of his title, [*Ram Rutton Rae* v. *Furrook-oon-nissa Begum*] 233

2. An order giving possession of lands, made by the *Foujdarry* (Police Magistrates) Court upon a charge of a breach of the peace, coming before the Magistrate, is not a determination respecting the right to such lands. [*Mussumat Imam Bandi* v. *Hurgovind Ghose*] - - - 403

TRESPASS.

See "JURISDICTION," 2.

TROVER.

A Bill of Sale and assignment of goods, described as being in certain warehouses belonging to A., was given by him for the loan of a sum expressed to have been paid on the day of the date thereof. Upon an action of trover brought against the assignee of A., who had seized the goods, it appeared, in evidence, that a portion only of the goods was in the warehouse specified at the date of the sale, and that no part of the loan was paid on that day, the same being discharged by instalments a few days afterwards: whereupon the Judges of the Supreme Court held, that there had been no valid transfer, and, consequently, no conversion, and gave an interlocutory judgment and verdict in accordance with such view.

Held by the Judicial Committee, on appeal from such judgment and verdict, and from an order refusing a new trial, that the judgment and verdict were not justified by the evidence, and must be reversed, and a new trial granted. [*Muttyloll Seal* v. *O'Dowda*] - 382

TRUSTEE.

See "AGREEMENT," 3.

UNDIVIDED HINDOO FAMILY.

See "GIFT," 1.

USAGE.

See "HINDOO LAW."

USURY.

To an action for recovery of arrears of rent due to the Plaintiff, under a sub-lease of a *pergunna*, the Defendant pleaded, that the sub-lease was part of a loan transaction, for the purpose of securing to the Plaintiff an illegal interest upon the loan, and was void, under Reg. XV. of 1793. The Courts in *India* held, that it was an usurious transaction, and dismissed the action. Upon appeal, this decision was confirmed by the Judicial Committee of the Privy Council. [*Wise* v. *Kishenkoomar Bous*] . . 201

VESTED INTEREST.

See "GIFT," 1.

WAGER.

By the common law of *England*, in force in *India*, an action may be maintained on a wager, although the parties had no previous interest in the subject-matter on which it is laid, if such wager be not against the interest or feelings of third persons, does not lead to indecent evidence, and is not contrary to public policy.

The mere circumstance that the wager concerns the public revenue, or creates a temptation to do a wrong, will not render it illegal.

A wager upon the average price which opium should fetch at the next Government sale at *Calcutta*, the Plaintiffs having to pay the Defendants the difference between such price and a sum named, per chest, and the Defendants having to pay the difference between such price and the sum so named, if the price should be above that sum, is not an illegal wager, or contrary to public policy, though the proceeds of the opium sold at *Calcutta* formed part of the Government revenue. The judgment of the Court below holding such wager illegal, reversed.

The Statute 8 & 9 *Vict.*, c. 109, amending the law relating to games and wagers does not extend to *India*. [*Ramloll Thackoorseydass Soojumnull Dhondmull*] - - 30.

WIDOW.

(Hindoo.)

Forfeiture of ancestral and other property, under *Ben.* Reg. XI. of 1796, for acts committed by the sons of A., held not to affect the rights of A.'s widow, and that she was entitled to maintenance out of the whole estate that was ancestral.

[*Mussumat Golab Koonwur* v. *The Collector of Benares*] - - - 246

See "ADOPTION."

"GIFT," 1.

WIFE.

The consent of a wife to the adoption of a son by her husband, a childless Hindoo, is not essential to the validity of the adoption. Adoption is the act of the husband alone; although the wife may join in it. [*Rungama* v. *Atchama*] - - 1

WILL.

See "GIFT," 1.

THE END.

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